Department of Public, Constitutional & International Law

International Human Rights Law

Study guide 1 for LCP409R

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PREFACE

We have designed TWO study guides to lead you through this course. On their own they do NOT contain sufficient information to pass this course. You are therefore expected to undertake independent research using sources such as legal instruments, textbooks, articles in human rights law journals, and case law.

The internet has also emerged as an important source. Many international human rights instruments, articles or research on this topic, as well as discussions on relevant court cases nowadays may be found on the internet. As far as South Africa is concerned, the case law is available on the website of the Constitutional Court (http://www.constitutionalcourt.org.za). The cases reported include:

- *S v Zuma* 1995 4 BCLR 401 (CC)
- *S v Makwanyane* 1995 6 BCLR 665 (CC)
- *S v Williams* 1995 7 BCLR 861 (CC)
- *Bernstein v Bester NNO* 1996 2 SA 751 (CC)
- *Azanian Peoples' Organization (AZAPO) v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC)
- *In re: certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC)
- *The Akademik Fyodorov: Government of the Russian Federation v Marine Expeditions Inc* 1996 4 SA 442 (C)
- *Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W)
- *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC)
- *President of the Republic of South Africa v Hugo* 1997 6 BCLR 709 (CC)
- *De Lange v Smuts NO* 1998 3 SA 785 (CC)
- *Harksen v President of the Republic of South Africa* 1998 2 SA 1011 (C)
- *K v K* 1999 4 SA 691 (C)
- *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 2 SA 279 (T)
- *South Africa National Defence Union v Minister of Defence* 1999 4 SA 469 (CC)
- *Government of the RSA v Grootboom* 2000 1 SA 46 (CC)
- *Harksen v President of the Republic of South Africa* 2000 5 BCLR 478 (CC)
- *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC)
- *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC)
- *Geuking v President of the Republic of South Africa* 2003 3 SA 34 (CC)

Please remember that this is an ADVANCED COURSE. As such, there is no prescribed textbook for the course. Nevertheless textbooks such as *International human rights in a nutshell* (Buergenthal, Shelton & Stewart), *Human rights from a comparative and international law perspective* (Church, Schulze & Strydom, Unisa, 2007), and *International human rights law in Africa* (Viljoen, Oxford 2007), will be very useful to you. The following articles, however, are your prescribed reading:

1 ''What future for human and peoples' rights under the African Union, New Partnership for Africa's Development, African Peer Review Mechanism and the African Court'' (Mangu, pp 136–163)
2 ''Ten years of international law in the South African courts: reviewing the past and assessing the future'' (Botha & Olivier, pp 42–77) in *South African Yearbook of International Law* (2004, No 29).

This study guide and Study Guide 2, which contains the international instruments, MUST be studied together, as they form an integrated whole.

In this course you are expected to work through the activities which you will find in the study guide (yes, you must actually do them!). These activities need not be submitted for marking. You are, of course, welcome to do so should you so wish.

Contact us if you have difficulty in answering them (after you have really tried to do so).

The activities are there to highlight important aspects, to point out links, and to provide exercises in writing and reasoning. The activities will also ensure that you work through the syllabus systematically, which can be helpful when studying a field as wide as human rights.

As for much of this course you are required to do activities or answer questions, we have decided to include a discussion of what we expect from you here. If you do not know what we expect, you will not know how to complete the activities or how to assess whether you are on the right track or not. In case you're wondering: YES, we actually expect you to answer these questions and assess your answers yourselves.

Many students encounter problems because they first do not read the questions, and second do not understand what is expected of them. Here are a few basic ''tips'' on what we are looking for in different types of question, and how to approach answering them:

(1) Short factual questions

This type of question is often asked as an ''icebreaker'' to put you at ease at the beginning of an examination. At this level it will not count more than five to six marks, and requires nothing more than rote learning. The key phrases here will be ''define'' or ''list''. What you do here is exactly what is asked: you give a definition or you list what you are asked. What you do not do is give a three-page discussion simply because you ''spotted'' the correct question. Your three page essay will not earn you more marks. Rather, you would waste time that could have been used for answering other questions; and run into the danger of not completing your examination or assignment questions.

We are sure you will agree that a type (1) question is not exactly stimulating. Having answered it in about two minutes you will be well on your way with ''marks in the bank'', and ready to move on to something more challenging. It is also a good ''self-test'' to see if you have actually mastered the principles you need to apply in more involved questions.

(2) Discuss critically/analyse/compare questions

This next type of question forms the heart of most examination papers and is there to test whether you understood the work, can draw conclusions, and make logical inferences and connections. These questions can vary as regards marks from 8 to 25, depending on the complexity of the issues involved. Again, the key to success lies in doing what you are asked to do.

If you are asked to ''compare'' two things and you merely list their characteristics, you have not answered the question. What you have done, is to turn a type (2) question into a type (1) question. While it is important to show that you know the characteristics of the two concepts, what you are being asked to do is to show how they differ, or in what way they are similar (or preferably both). There is nothing ''wrong'' with beginning your answer with a definition of the concepts you are asked

to compare. In fact, it is necessary. But then you must take it further and show that you understand how the concepts or characteristics differ/correspond, and its significance.

In the same vein ''discuss critically'' also requires that you do more than list characteristics. Here we test your ability to critically analyse something; that is, your ability to see part of a greater whole, relate that part to the whole, point out where the flaws are, show why one approach is logical while another is not.

''Analyse'' means ''break down into its constituent parts (the parts making up the concept), and show how they ''interact.''

(3) Problem-type questions

These questions are the most interesting ones, both to answer and to mark. So be warned! They are also the most important in your training as a lawyer, and so generally count the most (15–25 marks) in an examination. After all, when you are in practice in a year or so, your client will not walk into your office and ask you to define international human rights law or to compare the role of the individual in international law and human rights law. What he or she will do is to come in and say, ''I had a farm in Africa. It was taken away from me and I got nothing, so do something about it.'' In other words, you are required to analyse a set of facts and apply what you have learned to a practical situation.

Students are often unreasonably afraid of problem-type questions. This is foolish. In the first place you get marks simply for recognising the area of the work the problem deals with (and these are marks that you will not get anywhere else).

Having done that, you are back to the type (2) question, setting out the relevant section of the work logically and correctly, pointing out the consequences — the pros and cons — of the available courses of action, and then applying them to the facts. Particularly in international law, there is often no strictly ''right'' or ''wrong'' answer, so where is the problem? You are credited for your thought processes (and we will not say that for many of us that is an unexpected bonus!). Now get on with it, do the work, and most importantly, enjoy the course!

A note on how to approach problem-type questions — (hopefully you will find this to be a useful guide):

a Summarise the facts.
b Identify the issue (problems).
c Identify the main area of law — you may also have a sub-area of law: for example the main area of law may be ''contract law'' and the sub-area a factor influencing consensus such as ''misrepresentation''.
d State the RELEVANT law.
e State the RELEVANT facts.
f Apply the RELEVANT law to the RELEVANT facts.
g ADVISE the client.

PRINCIPAL ABBREVIATIONS

ACHPR	:	African Charter on Human and Peoples' Rights
AmCHR	:	American Convention on Human Rights
AU	:	African Union
APRM	:	African Peer Review Mechanism

CAT	:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	:	Convention on the Elimination of All Forms of Discrimination against Women
CERD	:	Convention on the Elimination of Racial Discrimination
CMW	:	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	:	Convention on the Rights of the Child
COAS	:	Charter of the Organisation of American States
ECHR:	:	European Convention for the Protection of Human Rights and Fundamental Freedoms (also used for the European Court of Human Rights (Strasbourg)). We will be specific and speak of the European Court.
ESC	:	European Social Charter
HL	:	Humanitarian Law
HR	:	Human Rights
HRC	:	Human Rights Committee
IAmCHR	:	Inter American Court on Human Rights
IAmComHR	:	Inter American Commission on Human Rights
ICC	:	International Criminal Court (Rome Statute)
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
ICJ	:	International Court of Justice
ICL	:	International Criminal Law
CTR	:	International Criminal Tribunal for Rwanda
ICTY	:	International Criminal for former Yugoslavia
IHRL	:	International Human Rights Law
IRL	:	International Refugee Law
NEPAD		New Partnership for Africa's Development
OAU	:	Organization of African Unity
PIL	:	Public international law
RDM	:	American Declaration on the Rights and Duties of Man (American)
SCSL	:	Special Court for Sierra Leone
UDHR	:	Universal Declaration of Human Rights
UN	:	United Nations
UNGA	:	United Nations General Assembly
UNSC	:	United Nations Security Council

TOPIC 1

THE DEFINITION AND DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW (IHRL)

1 DEFINITIONS

- 1.1 What is IHRL?
  - 1.1.1 Human Rights (HR)
  - 1.1.2 Human Rights Law (HRL)
  - 1.1.3 International Human Rights Law (IHRL)
- 1.2 IHRL as a branch of PIL
  - 1.2.1 PIL
  - 1.2.2 IHRL and related branches of PIL
    - 1.2.2.1 IHRL and HL
    - 1.2.2.2 IHRL and IRL
    - 1.2.2.3 IHRL and ICL
- 1.3 IHRL as a multi-level and justiciable law
  - 1.3.1 IHRL as law
  - 1.3.2 Different levels of application of IHRL

2 IHRL AND MUNICIPAL LAW

- 2.1 Sovereignty and erosion of sovereignty
- 2.2 Effects of IHRL at the national or municipal level
  - 2.2.1 Monism
  - 2.2.2 Dualism
- 2.3 The principle of subsidiarity and the application of IHRL at the national or municipal level

3 EVOLUTION OF IHRL

- 3.1 IHRL as a branch of PIL
- 3.2 IHRL as a specialised branch of PIL
  - 3.2.1 IHRL before the creation of the UN
  - 3.2.2 IHRL on and after the creation of the UN

3.2.2.1 IHRL and the UN Charter
3.2.2.2 IHRL after the creation of the UN

4 SOURCES OF IHRL

4.1 Article 38(1) of the statute of the ICJ and sources of PIL

4.2 Article 38(1) of the ICJ and sources of IHRL

4.2.1 Treaty and IHRL
4.2.2 Custom and IHRL
4.2.3 General principles of law and IHRL
4.2.4 Judicial decisions, writings and IHRL
4.2.5 Soft law and IHRL

5 IMPLEMENTATION AND ENFORCEMENT OF IHRL

6 FEEDBACK ON SOME ACTIVITIES

Study outcomes for Topic I

After studying this topic you will be able to

- define IHRL
- identify and discuss the difference between IHRL and PIL
- analyse these differences and relate them to broad trends in developments in the international community
- illustrate the development of IHRL through practical examples
- identify and discuss the relative importance of the sources of IHRL

To achieve these outcomes, you will need to

- study the particular sections of the documents to which you are referred
- read any other relevant IHRL literature
- understand and complete the activities, and analyse the case scenario

1 DEFINITIONS

1.1 WHAT IS IHRL?

This course deals with Human Rights (HR), Human Rights Law (HRL) and especially International Human Rights Law (IHRL).

1.1.1 Human Rights (HR)

Human rights (HR) are generally defined as denoting a ''special kind of moral claim'' that all humans may invoke by virtue of being human beings. These rights are generally divided into three groups or generations.

The first generation rights are civil and political rights. Historically, they were the first to be protected. Second generation rights include social, economic and cultural rights. Once first generation rights have been acquired or progress made in this regard, the focus usually shifts to the protection and promotion of second-generation rights, which have the characteristic of imposing a duty of action on the state.

Moreover their realisation is usually progressive, based on the available resources. Third generation rights are groups or peoples' rights.

Different instruments at the universal (TOPIC 1), the European (TOPIC 2), the Inter-American (TOPIC 3) and the African (TOPIC 4) level were adopted to protect and promote all three generations of rights.

The concept of ''generations'' of rights and their grouping into first, second and third generation tend to give the wrong impression that some rights are more important than others, depending on the ''generation'' to which they belong. This is not the case. All human rights are equally important and interrelated and indivisible.

1.1.2 Human Rights Law (HRL)

HRL consists of rules and principles that relate to the protection of human rights. These rules may apply at the national (Domestic Human Rights Law) or at the international level (IHRL).

1.1.3 International Human Rights Law (IHRL)

IHRL may de defined as a branch of Public International Law (PIL). IHRL consists of rules and principles that protect and promote individual and collective human rights. As compared to domestic human rights law that deals with the protection and promotion of human rights at national or municipal level, IHRL protects human rights at the international level, universal, regional or sub-regional level.

1.2 IHRL AS A BRANCH OF PIL

1.2.1 PIL

PIL is defined as a set of rules and principles that regulate the relations between states per se, between states and international organisations, and between international organisations per se. Some of these rules and principles concern the protection and promotion of human rights, and constitute IHRL.

States and international organisations are the subjects of public international law. They enjoy international legal personality. States are the primary subjects of PIL.

According to the 1933 Montevideo Convention that provides the conventional definition of a state, an entity qualifies as a state when it consists of the following elements:

- a territory
- a population
- a government
- independence or sovereignty

As you will remember, an international organisation is an organisation made up of states (or other international organisations) which derives its powers from a founding document drawn up by the state parties. Like states, international organisations are subjects of PIL. The UN is the classic example of an international organisation. PIL developed to regulate interaction between states rather than individuals.

International legal personality includes the capacity to

- act independently in the international sphere

- acquire rights and obligations
- conclude agreements
- enforce rights and agreements in international tribunals against another PIL subject

States and international organisations remain the principal subjects of PIL. Despite the rights which have been granted to individuals with the development of IHRL, the individual does not qualify as a fully-fledged subject of PIL.

The individual is entitled to rights and subject to obligations under PIL. However, he or she cannot conclude treaties and does not participate as such in the making of international law norms.

1.2.2 IHRL and related branches of PIL

Under IHRL the state is still there but the other subject involved is the individual. And this is the feature which distinguishes IHRL most clearly from traditional PIL, which is limited to the relations between states per se, between international organisations per se, or between states and international organisations.

In a sense, therefore, IHRL begins where traditional PIL ends, with the emergence of the individual as a key player on the international scene. The function of IHRL is to protect the individual (or group of individuals) against the power of the state.

IHRL is closely related to other branches of PIL, especially Humanitarian Law (HL) and International Refugee Law (IRL).

1.2.2.1 IHRL and HL

HL is that part of the law of war which deals with human rights. Its importance to this section of the course lies in the way in which international law was used, through the conclusion of treaties, to protect the individual combatant (fighter on the ground). HL in fact predated modern IHRL by quite some time. Accordingly, this was a reasonably ''revolutionary'' concept for its time, and certainly contributed to the development of modern IHRL and the recognition of the individual within international law.

IHRL and HL are both branches of PIL and both aim at protecting human rights. However, they differ on several grounds. First, IHRL protects human rights in any circumstances, while HL is a more specialised branch of IHRL since it aims at protecting and promoting human rights in situations of war and armed conflicts (internal and international armed conflicts), such as the rights of the civilians, wounded and prisoners. Second, IHRL and HL each has its own sources. HL is mainly based on the Geneva Conventions and the Protocols to these Conventions while IHRL is based on international human rights treaties.

HL should be distinguished from **humanitarian intervention**. The latter may be defined as joint or individual use of force by one or more states/international organisations to stop a state from treating its own nationals in a way that is so brutal and large-scale that it shocks the conscience of mankind.

Humanitarian intervention runs against the principle of sovereignty of states and non-interference in the domestic affairs of another sovereign state (see article 2(7) of the UN Charter). It can only be justified if it is consistent with the UN Charter. Otherwise it would amount to an act of aggression and would be illegal in international law.

A detailed study of HL falls outside the scope of this course.

1.2.2.2 IHRL and IRL

IHRL and IRL are also branches of PIL. However, while IHRL is more general and protect human rights of all human beings, IRL is mainly concerned with the protection of the rights of asylum seekers and refugees. Asylum seekers are those people who have fled persecution from their national authorities and seek protection or asylum in foreign countries. The situation of asylum seekers is a temporary one. Once they have been granted a refugee status, they cease being asylum seekers and become refugees. Refugees' rights are protected by conventions adopted within international organisations. The UN, for instance, adopted a convention and a protocol to protect the rights of refugees. At the regional and African level, a treaty was adopted within the Organisation of African Unity (OAU, now African Union) in 1969 to protect refugees' rights in Africa.

Like HL, IRL falls outside the scope of this course.

1.2.2.3 IHRL and ICL

IHRL is also close to International Criminal Law (ICL). ICL consists of rules and principles that define international crimes and the sanctions attached to these crimes, and establishes institutions to punish these crimes. Treaties and conventions that define and punish the crimes of genocide, war crimes and crimes against humanity, or aggression belong to both IHRL and ICL. The Rome Statute (otherwise known as the Statute of the International Criminal Court) established the International Criminal Court (ICC). Other statutes established international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).

ACTIVITY 1

1 Distinguish IHRL from the following concepts:
- HL
- humanitarian intervention
- ICL
- IRL

2 Why is IHRL considered a branch of PIL, and what is the relationship between state and population or between state and individuals?
3 Define international legal personality, identify the two main holders of international legal personality, and discuss whether the individual qualifies as a fully-fledged subject of PIL.

ACTIVITY 2

On 19 March 2003 the USA led a coalition that invaded Iraq. It appeared that weapons of mass destruction had somehow self-destructed. One of the justifications raised by the USA was their intention to liberate Iraqis from Saddam Hussein's dictatorship and massive violations of human rights. Assess the war on Iraq in international law. Explain whether the action could qualify as humanitarian intervention.

ACTIVITY 3

Think about the three definitions in Activity 1 above. The table below represents the parties (subjects) involved in the relationships governed by PIL and IHRL respectively.

- When we speak of a subject of PIL (and of IHRL), we are referring to an entity which has international legal personality (see the definitions above).

IHRL	PIL
(1) State/individual (2) State/group of individuals	(1) State/state (2) State/international organisation (3) International organisation/ international organisation

1.3 IHRL AS MULTI-LEVEL AND JUSTICIABLE LAW

1.3.1 IHRL as law

As pointed out earlier, IHRL is a branch of PIL. A number of scholars have levelled criticism at PIL. They argued that IHRL, like PIL, was not really law because IHRL is deprived of sanctions or mechanisms to enforce these sanctions.

The creation of institutions such as the ICC, ICTY, ICTR and SCSL to punish a number of violations of human rights serves as evidence that IHRL is law. So does the establishment of regional bodies such as the European, the Inter-American and the African Court. Finally, as will be demonstrated in TOPIC VI, IHRL also has effects and applies in the domestic legal system in the same way as domestic law.

IHRL is a justiciable law in the sense that it can be invoked at the universal, regional and domestic level to champion human rights. Sanctions and remedies may also be decided by courts or other enforcing mechanisms (committees or commissions) in case of violations of IHRL.

1.3.2 Different levels of application of IHRL

IHRL applies at three different levels: universal or UN level (Topic 2), regional (European system — Topic 3, Inter-American system — Topic 4, and African system — Topic 5) and domestic or national level (Topic 6).

Universal human rights systems should be distinguished from regional human rights systems. **Universal human rights systems** may be defined as human rights systems and the structures related to them which are designed to operate between all the nations of the world. Under this term we understand the human rights systems created by and within the UN, and to which all nations in the world are bound (or potentially bound). **Regional human rights systems** are designed to operate within a certain region or a group of states, and to which membership is limited.

In this course we shall study the UN system (Topic 2), the European system (Topic 3), the Inter-American system (Topic 4), the African human rights system (Topic 5) and the application of IHRL in a domestic system with reference to South Africa (Topic 6).

ACTIVITY 4

Identify the different levels of application of IHRL.

2 IHRL AND MUNICIPAL LAW

2.1 SOVEREIGNTY AND EROSION OF SOVEREIGNTY

Under PIL states are independent and sovereign in the sense that they are entitled to regulate their internal affairs without any foreign interference. However, IHRL erodes sovereignty. It is a treaty-based law. One of the effects of a treaty between parties is *pacta sunt servanda*, which means that treaties are to be complied with in good faith. By signing a treaty, a state limits its sovereignty.

Under many human rights treaties states accept the competence of independent international bodies to supervise their compliance, and sometimes states allow nationals to bring complaints against them before the implementing mechanisms of these treaties.

2.2 EFFECTS OF IHRL AT THE NATIONAL OR MUNICIPAL LEVEL

As IHRL is part of PIL, there is a relationship between PIL and domestic law. The relationship between international and national law poses two major questions: Can international law norms be invoked as part of the municipal (domestic, ie the internal legal system of a state) legal system? If so, what is the relative weight of the international and municipal systems? Two approaches concerning the relationship between international law and national law are usually juxtaposed: dualism and monism.

2.2.1 Monism

Monism is a doctrine according to which international law and domestic law are two aspects of the same law. A treaty, which is a source of PIL, is automatically incorporated into domestic law upon ratification. There is no need for ''enabling legislation'' to be enacted by parliament to give a treaty effect in domestic law. Most Francophone countries are actually monist.

2.2.2 Dualism

Dualism is a doctrine according to which international law and domestic law are fundamentally different. PIL cannot apply directly in domestic law. For PIL to apply it has to be ''domesticated'' or ''transformed'' by legislation which incorporates it into domestic law. Many countries which were colonised by Britain adopted dualism. This is the case of South Africa, as will be demonstrated in Topic 4 of this Study Guide.

2.3 THE PRINCIPLE OF SUBSIDIARITY AND THE APPLICATION OF IHRL AT THE NATIONAL OR MUNICIPAL LEVEL

Subsidiarity means that international (human rights) law co-exists with domestic law and compliments it without replacing it. States have the primary responsibility for protecting human rights law, but should do so in line with international law.

The principle of subsidiarity manifests in several ways. Under the European system (Topic 3) it is evidenced in the development by the European Court of Human Rights of the concept of the ''margin of appreciation'' in terms of which states are granted a degree of latitude in matters related to the balancing of individual and public interests, especially when moral issues are involved.

On the other hand, one of the basic rules for standing before IHRL enforcing mechanisms (commissions, committees or courts) is the rule of exhaustion of local remedies. This rule allows individuals to have standing before the HRC (Topic 2), the European Court (Topic 3), the Inter-American Commission and Court (Topic 4), the African Commission and the African Court (Topic), and before treaty bodies such as CAT, CERD, CRC, and CMW (Topic 2). This ''standing'' is known as *locus standi*, in other words, the ''ability'' to appear before a judicial or quasi judicial body. This ''ability'' arises from a human right, in our context, which is granted to an individual by a state. In the event of inter-state proceedings, that is proceedings where one state brings an action against another state, rights also accrue to the state.

Another illustration is found in the Rome Statute which establishes the ICC. The ICC has no jurisdiction over cases ''being investigated or prosecuted by a state that has jurisdiction'' (art 17.1) unless the state concerned is unwilling or unable to prosecute.

ACTIVITY 5

1 Explain the erosion of state sovereignty under IHRL.
2 Discuss the doctrines of monism and dualism.
3 Explain the principle of subsidiarity.

3 EVOLUTION OF IHRL

As IHRL forms part of PIL, its evolution is closely related to that of PIL. However, as specialised law that protects human rights at the international level, IHRL displays a separate evolution.

3.1 IHRL AS A BRANCH OF PIL

Although certain aspects of what we today regard as PIL are as old as history itself (eg, provision was made for extradition in a peace treaty between Ramses II of Egypt and Hattusili, a Hittite prince, in 1279 BC), PIL as we know it today is relatively new (it has been in existence for only some 400–500 years).

Why did modern PIL develop? In broad terms, PIL is the law between nations. In early times private individuals or institutions such as the feudal lords or the church were, for all intents and purposes, the owners of all land — and often also of the people on the land!

Relations between these ''individuals'' therefore took the form of what we would classify today as private-law rights and duties — something like the law between neighbours. However, round about 1400, a change set in when the collapse of feudalism, the Renaissance, and the Reformation resulted in the emergence of entities that existed separately from the individuals who were either living in them, or running them. In short, states were born.

The emergence of states as distinct territorial units brought with it a feeling of nationalism among the inhabitants of the states. This, in turn, led to the feeling that

what went on in the state was the sole business of the state: the state was master over its own territory and its own destiny. The concept of state sovereignty was born.

A state with a government of its own exercised rights over its territory to the exclusion of all ''foreign'' elements. The individual Lord of the Manor (or the Pope) had been superseded by an impersonal entity which, although (ideally) representing the individual, enjoyed an existence separate from the individuals comprising it.

All would have been well had there been only one state. However, there were various states, each claiming rights. Inevitably, these claims came into conflict. With this conflict came the need to regulate relations between states. And so public international law was born: ''public'' because it dealt primarily with the state rather than the individual; ''international'' because it dealt with relations between nations represented by states; and ''law'' because it comprised a set of rules.

Law, however, is a dynamic concept, and this is no less true of PIL. As the need for universal control developed, and particularly as the needs of commerce became more sophisticated, so too we saw a sophistication of the instruments used to regulate relations. There was a move towards ''world government'' through organisations dealing with issues as varied as peace (eg, the United Nations), international labour (eg, the International Labour Organisation), commodity prices (eg, the International Tin Council), and the like. The international organisation was born.

Like a state, an international organisation is a subject of PIL, enjoying international legal personality. This was clearly established in Reparations for Injuries Suffered in the Service of the United Nations 1949 ICJ Rep 174.

You will have noticed that since the emergence of the state as a separate entity, the role of the individual has virtually disappeared from our discussion of PIL. However, while states were debating their rules of cooperation, plying their trade, and fighting their wars, individuals within the states were making money from trade, losing money as a result of state action, or dying in the wars. Needless to say this situation could not continue indefinitely, and one of the newest ''trends'' in PIL has been a re-evaluation of the position of the individual. Since the mid-1900s, international law has in a few limited instances taken on a ''person-centred'' colour. In this course we explore the emergence of the individual as a player on the international scene.

So far we've examined the history of PIL purely from the point of view of its subjects. However, this gives us only half the picture. PIL, far more than municipal law, is a law of intellectual flow. It reflects the major ideological trends as they sweep (or perhaps creep?) through the world.

The idea of international law as a law solely between states is linked to state sovereignty and remains the dominant theme of PIL.

The emergence of the international organisation as an entity distinct from its member states developed in response to the need to regulate issues affecting states as part of a world community, and to place some limits on the potential for conflict inherent in a purely self-serving state sovereignty.

The emergence of the individual in international law developed as a result of the atrocities of two world wars, the emancipation of colonial territories, and the urge of the individual for an acknowledgement of his human rights and the right to self-determination.

We have not reached what the Japanese American scholar Francis Fukujama would term ''the end of history and the last man'' (1992) in the development of PIL. The ongoing international financial crisis, which is a crisis of capitalism and liberalism whose triumph was celebrated as ''the end of history'', is a clear indication that the

world might have entered an era of great uncertainty and disorder calling for a restructuring of its founding instruments.

We are certainly in a state of flux at present. How things will develop is uncertain. Arguably IHRL will certainly continue to play a crucial role in the development of PIL as the human rights-tide keeps on flowing strongly. But its character and focus may change from time to time. In recent years, for instance, we have seen the emphasis shifting from the ''first-generation'' rights (life, human dignity, liberty) to ''second-generation'' rights (the means of achieving these rights) and even to ''third-generation'' rights (eg the right to a safe environment). The dominant theme in the world today is no longer the communist/Western (socialist /capitalist) divide, but rather the rich/poor one with human rights calls continuously made to redress the imbalance.

The rise of the Afro-Asian and South American states (the ''developing states'') to prominence and numerical dominance in the international community has led to a reassessment of many of the traditional concepts in international law, with these states demanding their place in international fora such as the UN Security Council and the World Trade Organisation. These states are also calling for a ''human face'' to globalisation led by the International Monetary Fund and the World Bank in order to bring an end to their marginalisation.

African countries have also taken the lead in championing the ''right to development'' as an independent fundamental right. ''African Renaissance'' has become a war-cry for these countries. In order to achieve such renaissance and bring an end to the marginalisation of the continent and its people in international affairs, the New Partnership for African Development (NEPAD) was launched and the African Union (AU) created. And this AU, which takes human rights more seriously than the defunct OAU, does not seem to be the end of the process.

More and more African leaders and people have endorsed the idea of the ''United States of Africa'' as a prerequisite for an African Renaissance. The project of the establishment of the ''United States of Africa'' was inherited from OAU founding fathers and pan-Africanist leaders such as Kwameh N'Krumah and Julius Nyerere.

ACTIVITY 6

With the three key concepts of **state sovereignty**, **international organisations** and the **individual** as point of departure, describe the interrelationship between the development of IHRL and the need of the international society at the time.

3.2 IHRL AS A SPECIALISED BRANCH OF PIL

In view of the above, the development of IHRL presupposed that states and international organisations had already exited and the law of treaties already emerged, with states engaging in the conclusion of treaties to create international organisations aimed to protect human rights, or in the development of customary international laws.

The creation of the UN constitutes a major step in the evolution of modern IHRL. Accordingly, the development of IHRL may be divided into two periods: before and after the creation of the UN.

3.2.1 IHRL before the creation of the UN

IHRL was rather unstructured before the creation of the UN. This does not imply that

human rights were not protected at the international level. However, IHRL was still subordinate to other branches of law such as HL and International Labour Law, which also protect the rights of some categories of people, those in war situations, or the workers respectively.

As you know, HL and International Labour Law are older than IHRL. The Geneva Conventions, which are the primary sources of HL, were the result of the codification of customary international law dealing with the law of war. These Conventions predated the major IHRL instruments.

All the same, the International Labour Organisation (ILO) was created before the UN, and workers' rights, particularly their right to freedom of association, were already championed before the adoption of the UDHR and the ICESCR.

On the other hand, the human rights movement was behind the adoption of the Covenant of the League of Nations in 1920. Therefore it is not surprising that there is little mention of human rights in this document. However, note the following articles of the Covenant which have implications for the development of IHRL:

- Article 22: The mandates system
- Article 23: International labour standards

ACTIVITY 7

Explain the effect of articles 22 and 23 of the Covenant of the League of Nations (see Study Guide 2) on the development of IHRL after the dissolution of the League and the establishment of the UN to become a dynamic force in modern IHRL.

3.2.2 IHRL on and after the creation of the UN

3.2.2.1 IHRL and the UN Charter

The creation of the UN marked a decisive moment in the development of IHRL. The Charter was signed in San Francisco, USA, in 1945. The UN Charter contains a number of provisions related to human rights (see Topic 2). The primary UN objective — ''to maintain international peace and security'' — also entails the protection and promotion of human rights and the development of IHRL.

3.2.2.2 IHRL after the creation of the UN

IHRL developed tremendously after the creation of the UN Charter. This development occurred at the universal, regional, sub-regional and domestic level.

At the universal level, several major IHRL instruments were adopted. These include the UDHR, ICCPR, ICESCR, CERD, CEDAW, CAT, CRC, and CMW (see Topic 2). Many other conventions and resolutions were adopted to protect and promote human rights.

The development of IHRL at the regional level manifested through the European system (Topic 3), the Inter-American system (Topic 4), and the African system (Topic 5). The founding instruments of these regional systems even refer to the UN Charter or to the International Bill of Rights (Topic 1).

The movement towards the enforcement of IHRL in domestic law by the domestic courts (Topic 6) also developed after the creation of the UN.

ACTIVITY 8

Discuss the role played by the UN in the development of IHRL.

4 SOURCES OF IHRL

In the course General Principles of International Law (LCP401H), which you must either have completed or be busy with, considerable attention is paid to the sources of general PIL.

As IHRL is part of PIL, it shares these sources with PIL The accepted sources, as you remember, are to be found in article 38 of the Statute of ICJ. It is therefore important to revisit these sources you already dealt with in the course General Principles of International Law (LCP401H) or found in any relevant book or literature on PIL, before focusing on the specific relationship between these sources and IHRL.

4.1 ARTICLE 38(1) OF THE STATUTE OF THE ICJ AND SOURCES OF PIL

In its first subsection (a 38(1)), this provision identifies the following sources:

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states [treaties]
(b) international custom, as evidence of a general practice accepted as law (custom, with its two legs of *usus* and *opinio iuris*)
(c) general principles of law recognised by civilised nations
(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means to determine the rules of law

These are also the sources of IHRL, and we expect you to know these sources and the details surrounding their development and application as explained in the course General Principles of International Law (LCP401H).

It is generally accepted that the sources of general international law listed in article 38 are not hierarchic — in other words, just because treaty is mentioned in (a) and custom in (b), it does not mean that treaty is more important, or ''stronger'', than custom. This is true of (a), (b) and (c), but not of (d), which is clearly stated to be ''subsidiary'' or secondary.

In the case of IHRL, however, because it is essentially a ''new law'' dating from the end of the Second World War, the above does not necessarily hold true. What we expect of you here is to apply the general principles governing the sources of PIL to international human rights. Think about each of the sources and assess their importance for IHRL. The following pointers should help.

4.2 ARTICLE 38(1) OF THE ICJ AND SOURCES OF IHRL

Are sources of IHRL only those sources listed in article 38(1) of the statute of the ICJ that protect, or relate directly to the protection of, human rights? Some of these sources are more important than others, as IHRL is primarily a treaty-based law.

4.2.1 Treaty and IHRL

It is worth revisiting the law of treaties, including the definition, the phases in the life of a treaty, the effects of the treaty between parties and vis-à-vis the third parties, the interpretation of treaties, reservations to treaties and withdrawal from and denunciation of treaties.

IHRL is essentially a treaty-based law. Both at the universal level (Topic 2) and at the regional level (European system — Topic 3, the Inter-American system — Topic 4, the African system — Topic 5). Because the way in which a state treats its people (or people in its territory) is so closely linked to principles of sovereignty — the principle of ''Who gave you the right to tell me what to do in my country?'' — the limitations accepted by a state on its power by way of treaty are very important.

As you will see, treaty is certainly the most important source of IHRL. By concluding a treaty, the state distances itself from the ''domestic-affairs'' defence against the ill-treatment of foreigners or its own people — do you remember article 2(7) of the UN Charter from your study of general PIL? — and places its conduct within the sphere of concern of all other parties to the treaty and the international community as a whole. (We shall return to the application of treaties in the municipal law of a state in Topic 4.)

ACTIVITY 9

Explain, in no more than 10 lines, how the conclusion of a treaty resolves the problem of sovereignty, which has traditionally been a bar to the development of IHRL.

4.2.2 Custom and IHRL

What happens if a document containing human rights does not qualify as a treaty to which states can agree, or if a certain human right is not covered by the treaties to which a state has agreed? Shall we say, ''Sorry, it is not in a treaty, so it doesn't exist'', and a mad dictator can carry on, regardless?

Although looking around you at the world today you could perhaps understand this reasoning, it doesn't help the poor human who is having his rights trampled! It is here where custom comes into play as a source of IHRL. Remember, however, that to qualify as a customary rule of IHRL, the same basic requirements of *usus* and *opinio iuris* set for the development of customary PIL apply to the development of IHRL. (This is addressed further in the context of the UDHR in Topic 2). However, here we feel that there has been a shift in emphasis. Think in particular of the ''persistent objector'' argument used to exclude the application of a rule of customary international law to a specific state.

Custom must meet the following requirements: *usus* and *opinion juris*. To qualify as international custom, a practice should have emerged from various nations and opinion juris entails that such practice or custom has come to be regarded as binding. Not all international custom can be regarded as a source of IHRL, but only that protects or promotes human rights at the international level.

Such custom has been progressively codified through treaties. It has resulted not only from the practice in a state, but also from the principles accepted by states as governing civilized nations. One of these principles is that a civilized nation should protect and promote human rights.

ACTIVITY 10

Discuss custom and its importance as a source of IHRL.

4.2.3 General principles of law and IHRL

Again we are dealing with a shift in emphasis. Review what was said in the general course on the role of general principles. Ask yourself in what way general principles of law (recognised by civilised nations) differ from treaty and custom. Think about the subjective (consensual) nature of both treaty and custom. Do you feel this source is a little more objective? The existence of a general principle is established by looking at different systems and finding a rule common to all (or most) of them. No one has to consent to that rule being there — it simply is.

4.2.4 Judicial decisions and writings and IHRL

Because of the highly developed system of ''courts'' or adjudicative bodies created by the various human rights treaties you will be studying in the rest of this course, this source is of far more importance to the development of IHRL than of ''ordinary'' PIL.

There are also judicial decisions from international courts or tribunals that protect human rights and writings (see below) in this sense. One may refer to the decisions of the ICJ, the ICC, the ICTR, the ICTY, and the SCSL as sources of IHRL at the universal level. The same goes for decisions of regional bodies such as the European Court (Topic 3), the Inter-American Court and Commission (Topic 4) and the African Court (Topic 5).

Articles and other papers written by prominent international and especially human rights scholars may also be considered as sources of IHRL. However, as compared to the judicial decisions and other sources, these are subsidiary sources. They are not binding.

4.2.5 Soft law and IHRL

Do you remember what ''soft law'' is? No? Well revise what was said in the general course. IHRL again lends itself to the use of soft law in that many IHRL bodies (commissions, councils, etc) issue nonbinding guidelines dealing with various rights (codes of conduct for judicial officers, police, the army, etc). These are an increasingly important source of IHRL. Resolutions made by international organisations or during international conferences are also sources of IHRL. Although they are not binding, they may later develop into treaties or international customs.

ACTIVITY 11

1 Discuss the role that the ICJ has played and can still play in the development of IHRL on the basis of some of its judgments.
2 Explain the importance of ''soft law'' and legal writings as sources, and their respective roles in the development of IHRL, using some examples.

5 IMPLEMENTATION AND ENFORCEMENT OF IHRL

As pointed out earlier, IHRL is law. It is justiciable and enforceable. Implementing or monitoring bodies have been established at the different levels, as well as general mechanisms by which these bodies operate.

Supervisory bodies at the universal level include the HRC (ICCPR), CERD Committee (CERD), CEDAW Committee (CEDAW), CAT Committee (CAT), CRC Committee (CRC) and CMW Committee (CMW) (Topic 2). Regional implementing bodies are the European Court (Topic 3), the Inter-American Commission and Court (Topic 4) as well as the African Commission and Court (Topic 5).

Specific procedures to approach these bodies generally include the following:

- state reporting
- inter-state communications
- individual communications (subject to the state party having made a declaration provided for by the treaty)

In response these bodies usually make general comments, issue concluding observations or investigate before making their observations.

At the domestic level courts of law are also IHRL implementing or supervisory bodies. They decide whether IHRL has been violated and what the remedies should be. However, non-judicial bodies such as human rights commissions and other institutions supporting democracy can also implement or monitor the application of IHRL at the municipal level.

CASE SCENARIO

Namibia and Zimbabwe are two Southern African states. They are member states of the Southern African Development Community (SADC), which is a sub-regional international organisation. They are also bound by a treaty on mutual co-operation protecting the rights of their citizens in their respective territories.

MAGOPE is a Namibian company which farms tobacco in Zimbabwe. The manager of the consortium is a Zambian citizen living and working legally in Zimbabwe.

MAGOPE's farms are seized by the Zimbabwean government, in line with its controversial land-reform policy, and redistributed to a wealthy member of Parliament. No compensation is paid.

During the seizure of the farms, the Zambian manager, Mr Budeli, is severely beaten by the Zimbabwean police and war veterans, and ends up in hospital. Although both MAGOPE and Budeli attempt to approach the Zimbabwean courts for assistance, they have no success.

ACTIVITY 12

You are a law student registered at Unisa. MAGOPE and Budeli approach you for assistance. Advise them on the following questions:

1 The nature of the law (PIL, IHRL, or domestic law?) regulating the relations between Namibia, Zambia, and Zimbabwe.
2 Whether Zimbabwe, as a SADC member state, is also bound by the Namibian and Zambian Bills of Rights, which enshrine the rights to human dignity, equality, and nondiscrimination, freedom and security of the person, a fair trial, property, freedom of trade, occupation and profession.

3 The place of the SADC treaty among the sources of PIL.
4 Whether Namibia, Zambia, Zimbabwe, SADC, MAGOPE and Budeli all enjoy international legal personality.
5 Whether the government of Zimbabwe is entitled to enact legislation on land reform in Zimbabwe, as it did, and the basis for such competence in PIL.
6 Whether the principle of sovereignty entitles the government of Zimbabwe to violate the rights of its citizens and foreigners.
7 Whether any Namibian and Zambian military intervention in Zimbabwe to protect MAGOPE and Budeli would be possible, and whether such intervention would be consistent with the principles of PIL.

6 FEEDBACK ON SOME OF THE ACTIVITIES

ACTIVITY 1

Self-evaluation.

ACTIVITY 2

The invasion of Iraq violated the UN Charter since it was not decided by UNSC and did not qualify as ''self-defence'' action. Nor did it qualify as humanitarian intervention.

The invasion of Iraq, as justified by the need ''to liberate the people of Iraq from a system in which they were persecuted and their human rights violated on a massive and systematic scale'', may lead to the conclusion that it was a case of humanitarian intervention. However, this doctrine is disputable in international law. As shown in the activity, this was one justification, and it even came after we had been told by the Americans and the British that they were concerned only with the manufacture and development of weapons of mass destruction by Saddam Hussein's regime. This finally proved to be false.

ACTIVITY 3

Refer to international law on the subjects of PIL (states and international organisations). IHRL, as a branch of PIL, marks the development of PIL through the importance given to individuals or groups, although the latter do not yet qualify as subjects of international law.

ACTIVITY 4

Self-evaluation.

ACTIVITY 5

Self-evaluation.

ACTIVITY 6

The emergence of sovereign states, international organisations and the individual as a player to be reckoned with on the international scene each corresponds to a different stage in the development of international law: the concept of state sovereignty relates to the first stage, the emergence of international organisations to the second stage, and the emergence of the individual to the last stage. The present stage is dominated by all three these concepts, and their ''cohabitation'' (ie, their ''existing together'') illustrates their close interrelationship.

ACTIVITY 7

Self-evaluation.

ACTIVITY 8

Self-evaluation. Possible examination question.

ACTIVITY 9

Self-evaluation. See activities 1 and 2 under Topic I. State sovereignty is not incompatible with the development of IHRL, which protects and promotes human rights. IHRL is mainly a treaty-based law. States are free to enter into a treaty, and by doing so they voluntarily accept some limitation to their sovereignty.

ACTIVITY 10

Self-evaluation.

ACTIVITY 11

Self-evaluation. Possible examination question.

ACTIVITY 12

The relations between Namibia, Zambia, and Zimbabwe are regulated by PIL. Zimbabwe as an independent and sovereign state is not bound by the Namibian and Zambian Bills of Rights. The SADC treaty is an international convention. Accordingly it is a source of PIL. Namibia, Zambia, Zimbabwe and SADC enjoy international legal personality. This is not the case for MAGOPE and Budeli. The principle of sovereignty does not allow the government of Zimbabwe to violate the rights of its citizens and foreigners. Any Namibian and Zambian military intervention in Zimbabwe to protect MAGOPE and Budeli would be inconsistent with the principles of PIL as enshrined in the UN Charter, the SADC treaty and other relevant international instruments.

TOPIC 2

THE UNITED NATIONS SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

1 HUMAN RIGHTS AND THE UN

1.1 Creation of the UN

1.2 The UN Charter and Human Rights

1.3 The UN Charter Human Rights System

1.3.1 UN organs dealing with state impunity

1.3.1.1 UN principal organs
1.3.1.2 UN specialised agencies

1.3.2 UN judicial organs dealing with individual impunity

1.3.2.1 The ICC
1.3.2.2 Special tribunals

2 THE INTERNATIONAL BILL OF RIGHTS

2.1 Introduction

2.2 The UDHR

2.2.1 The legal nature of the UDHR
2.2.2 Rights under the UDHR
2.2.3 Enforcement of the UDHR

2.2.3.1 The UDHR as an interpretation of the Charter
2.2.3.2 The UDHR as customary international law
2.2.3.3 The UDHR as general principles of law recognised by civilised nations

2.3 The ICCPR

2.3.1 The legal nature of the ICCPR
2.3.2 Rights under the ICCPR
2.3.3 Enforcement of the ICCPR

2.4 The ICESCR

2.4.1 The legal nature of the ICESCR
2.4.2 Rights under the ICESCR
2.4.3 Enforcement of the ICESCR

3 OTHER MAJOR UN HR TREATIES

3.1 The CERD

3.1.1 Introduction
3.1.2 State obligations
3.1.3 Enforcement

3.2 The CEDAW

3.2.1 Introduction
3.2.2 State obligations
3.2.3 Enforcement

3.3 The CAT

3.3.1 Introduction
3.3.2 State obligations
3.3.3 Enforcement

3.4 The CRC

3.4.1 Introduction
3.4.2 State obligations
3.4.3 Enforcement

3.5 The CMW

3.5.1 Introduction
3.5.2 State obligations
3.5.3 Enforcement

4 FEEDBACK ON SOME OF THE ACTIVITIES

Study outcomes for Topic II

After studying this topic you will be able to:

- distinguish between universal and regional human rights documents
- identify, evaluate and discuss the provisions in the UN Charter relating to IHRL
- understand what is meant by the IBR, identify the relevant documents, and evaluate their nature in terms of IHRL
- analyse and internalise the contents of these documents
- discuss and evaluate the enforcement mechanisms available under these documents
- assess the role of the UN in the development and promotion of IHRL

1 HUMAN RIGHTS AND THE UN

1.1 CREATION OF THE UN

The UN was created after the Second World War (WWII). The UN Charter was signed in San Francisco, USA, in 1945. South Africa was the only African country that participated in the creation of the UN. The background to the creation of the UN is provided in the Preamble to the Charter. Article 1 lists the objectives and principles of the UN. Sustainable international peace and security as one of the major objectives of

the UN is not possible without protection and promotion of individual and collective human rights. The same goes for the realisation of other UN objectives. The UN Charter is therefore human rights friendly. It also contains a number of provisions that directly relate to the protection and promotion of human rights.

ACTIVITY 1

As a document serving political rather than ideological interests, the UN Charter failed to live up to the expectations of human rights activists. Discuss this statement critically, showing clearly what the expectations were, why they arose, and why the major negotiating states failed to live up to them.

1.2 THE UN CHARTER AND HUMAN RIGHTS

In this section we look at specific provisions in the Charter where human rights feature.

You will find the relevant provisions in Study Guide 2: UN Charter. Read through the articles of the Charter listed below:

- Preamble: The most immediate provision is the second clause, beginning with ''to reaffirm faith ...'', but it will do you no harm to read the whole preamble.
- Article 1(3): promoting and encouraging respect ...
- Article 13: initiate studies ... make recommendations ... (b) ... assisting in the realisation of human rights
- Article 55: promote ... universal respect for ... observance of ...
- Article 56: action ... for purposes set forth in article 55(b)

ACTIVITY 2

You have read these provisions at least twice and have highlighted certain key concepts. Now, relate these concepts to the binding nature of the obligations imposed on member states by these provisions in the Charter.

Despite their essentially nonbinding or advisory nature the human rights provisions in the UN Charter have contributed to the development of IHRL in important ways. Make sure that you are able to explain these ways with reference to examples.

It is clear that the aim of the UN is to protect and promote respect for human rights in the world. This is reflected not only on the UN Charter but also in several treaties which have been adopted within the UN to protect and promote these rights. Accordingly, it is worth distinguishing between the UN Charter system for the protection of human rights and the UN treaty-based human rights system.

1.3 THE UN CHARTER HUMAN RIGHTS SYSTEM

The first aim of the system was to end state impunity, as states and heads of states were expected to always protect the rights of their people. However, with time individuals have also been proven to be involved in massive human rights violations. Therefore the UN Charter human rights system has evolved to take these developments into account.

We shall therefore look at institutional mechanisms established under the UN Charter not only to deal with state impunity in respect of the violation of human rights, but also with individual impunity in respect of the violation of human rights.

1.3.1 UN organs dealing with state impunity

1.3.1.1 UN principal organs

The UN Charter established five principal organs, namely the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat (article 7). All these principal organs play a major role in the protection and promotion of human, individual or collective rights.

a *The General Assembly (articles 9–22) and HR*

As far as human rights are concerned, the responsibility of the GA is to assist in the ''realisation of human rights and fundamental freedoms (article 13). The main contribution of the UN GA lies in the field of standard-setting. Debates and discussions have over the years resulted in numerous resolutions and declarations (soft Law) and binding treaties. The first of these resolutions was the landmark UDHR of 1948. Other resolutions include the GA resolution of 1990, convening a world Conference on Human Rights, the 1993 resolution establishing the post of UN High Commissioner for Human Rights, the 1994 resolution proclaiming the UN Decade of Human Rights Education. The UN GA also receives annual reports from the various human rights treaty bodies, from thematic and country reporters.

b *The Security Council (articles 23–32) and HR*

The mandate of the UN SC to maintain ''international peace and security'' (article 55 and 56 of the UN Charter) has been extended to include human rights-related issues. The UN SC has taken numerous resolutions (binding) to protect and promote human rights while exercising its mandate to maintain and promote international peace and security. The ICTR, ICTY and SCSL were created by such resolutions.

c *Economic and Social Council (articles 61–72) and HR*

ECOSOC is one of the principal organs created by the UN Charter. Composed of 54 members, ECOSOC may make recommendations to the UN GA on a wide range of topics, including human rights matters. ECOSOC was instructed to set up commissions to further the promotion of human rights. These commissions include the UN Commission on Human Rights (UNCHR), the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (later renamed the Sub-Commission on the Promotion and Protection of Human Rights), the Commission on the Status of Women, and the High Commissioner for Human Rights.

The main accomplishment of the UNCHR was the elaboration of the three instruments of the IBR, namely the UDHR, the ICCPR and the ICESCR. The Commission was also instrumental in the process of drafting other human rights instruments, such as the CERD. The UNCHR was replaced by the Human Rights Council in 2006.

d *The Trusteeship Council (articles 86–91) and HR*

The Trusteeship Council played a role in the realisation of the right to self-determination. With no territory left under trusteeship, this organ has lost its relevance.

e *The ICJ (articles 92–96) and HR*

The ICJ is mainly a court for states, not for individuals. However, by adjudicating international conflicts and disputes, and exercising its advisory and contentious mandates, it also indirectly protects human rights.

f *The Secretary General (articles 97–101) and HR*

The UN Secretary General in his capacity as the highest servant of the UN has also been instrumental in the adoption of resolutions on human rights by the GA and the Security Council.

1.3.1.2 UN specialised agencies

UN specialised agencies (UNICEF, UNESCO, HCR, and financial institutions such as the International Monetary Fund [IMF], the World Bank, the World Trade Organisation [WTO]) are also involved in the protection and promotion of human rights.

ACTIVITY 3

1 Distinguish between the UN Charter-based HR system and the UN treaty-based HR system.
2 Identify the principal organs of the UN and the role played by every organ in the protection and the promotion of HR.

1.3.2 UN judicial organs dealing with individual impunity

1.3.2.1 The ICC

The ICC is not a UN organ despite being established by a UN conference (the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court). It is based on the Rome Statute of the ICC (see Study Guide 2), but has well-developed links with the UN. According to the Law of Treaties, this Statute is binding only on those states that formally ratified or acceded to it. More than 100 states have ratified the ICC Statute, including 29 African countries.

The ICC Statute came into force on 1 July 2002. So far Africa has dominated its agenda. The Office of the Prosecutor has investigated three matters referred to it by African states (Central African Republic, Democratic Republic of Congo, and Uganda) and a matter referred by the UN SC under article 13(b) of the Statute (Darfur, Sudan). In respect of the first three, international mandates of arrest were executed to arrest Jean-Pierre Bemba (for war crimes in CAR), Thomas Lubanga and Bosco Ntangana (war crimes in Ituri, DRC), and Joseph Khony (war crimes in Uganda). Recently Sudanese President Omar el-Bechir was also indicted.

The ICC is competent to deal with four crimes: aggression, genocide, war crimes, and crimes against humanity.

1.3.2.2 Special tribunals

a *The ICTY*

The first international special tribunal was the ICTY, established in 1993. It was the

first truly international tribunal to prosecute serious violations of international humanitarian law. It covered violations arising from an international armed conflict.

b *The ICTR*

The ICTR was established on 8 November 1994 by the UNSC under Chapter VII of the UN Charter to prosecute and punish individuals responsible for genocide and other serious violations of international humanitarian law committed in Rwanda between 1 January and 31 December 1994. The ICTR extended the ambit of the ICTY's protection, as it deals with violations arising from internal (non-international) conflict.

c *The SCSL*

The SCSL was established by an agreement between the UN and the government of Sierra Leone pursuant to a Security Council resolution. This is a ''hybrid international and national'' court. It may prosecute crimes both under international law, such as crimes against humanity and violation of international humanitarian law, and crimes under Sierra Leonean law.

ACTIVITY 4

Discuss the role of the ICC, the ICTY, the ICTR and the SCSL in dealing with individuals' impunity and the protection of human rights.

2 THE INTERNATIONAL BILL OF RIGHS

2.1 INTRODUCTION

As we have seen, the UN Charter failed to include a ''bill of rights'' in its provisions. It is therefore hardly surprising that one of the first tasks of the newly established UN was to propose that a bill of rights be drawn up. The Commission on Human Rights was established, and tasked with drafting an International Bill of Rights.

2.2 THE UDHR

2.2.1 The legal nature of the UDHR

The UDHR was adopted by the UNGA as GA Resolution 217 (III) of 10 December 1948. It had the following two important consequences, which you should remember from your study of general public international law:

- GA resolutions are NOT binding on member states. This means that they are not enforceable: they merely make recommendations which states should — as opposed to must — follow.
- GA resolutions are not treaties. This means that states who did not vote for the original resolution cannot ''join'' or ''accede to'' a GA resolution at a later stage.

Bear this in mind as you study the provisions of the UDHR, and we shall take it further in 2.2.3 below, when we look at the enforcement of the rights.

2.2.2 Rights under the UDHR

Turn to the text of the UDHR in Study Guide 2. Complete the following table, filling in the right in the middle column, and stating whether it is a civil/political right or an economic/social/cultural right in the last column.

ACTIVITY 5

Article	Right and Distinctive Feature/s	Civil/Political or Social
1		
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You now have an idea of the rights covered by the UDHR. It is, however, also important to know the extent to which these rights may be legitimately limited or curtailed. This you will find in article 29.

In terms of article 29(2), rights may be limited by a state

- through the enactment of law
- to secure the recognition of the rights of others
- to meet the just requirements of morality, public order and general welfare in a democratic society

Article 29(3) is an absolute and overriding provision, making the exercise of rights/freedoms subject to the purposes and principles of the UN — see chapter 1 of the UN Charter discussed under section 2 above.

Article 30 prohibits any activity by a state, group or person aimed at the destruction of any of the rights in the UDHR.

ACTIVITY 6

Discuss whether the rights in the UDHR are absolute or not.

2.2.3 Enforcement of the UDHR

The UDHR is an unenforceable GA resolution. However, since it is such an important document, jurists have looked for other bases on which its provisions can be classified as enforceable international law. The following three main bases are raised in this regard:

2.2.3.1 The UDHR as an interpretation of the Charter

As you know, the UN Charter is a treaty. We dealt extensively with the interpretation of treaties in the general international law course. The relevant provisions are articles 31 to 33 of the Vienna Convention on the Law of Treaties. Article 31 is the most important, and provides as follows:

1 A treaty shall be interpreted in good faith in accordance with the ordinary

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more of the parties in connection with the treaty and accepted by all other parties as an instrument related to the treaty;

3 There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4 A special meaning shall be given to a form if it established that all the parties so intended.

Apply the provisions of article 31 to the UDHR and see if you can find a binding source here. Remember that what you are interpreting is a treaty (the UN Charter), and not the UDHR itself (which is not a treaty!).

2.2.3.2 The UDHR as customary international law

Turn to Topic I section 4, ''Sources of IHRL''. What are the requirements for the development of custom? Remember *usus* and *opinio iuris*. Now apply these to the UDHR and decide whether its binding force can be established through custom. Remember, too (and this is very important for the answer) that the entire document need not form custom: it can be a ''piecemeal'' recognition of certain rights.

2.2.3.3 The UDHR as general principles of law recognised by civilised nations

While you are busy with the sources in Topic I, have a look at this source too, and see whether it could form a basis for finding the UDHR binding.

ACTIVITY 7

Evaluate the nature of the obligations on states arising from the UDHR. In your answer, consider the various arguments used to establish the UDHR as a system of binding obligations.

2.3 THE ICCPR

2.3.1 The legal nature of the ICCPR

One of the main problems with the UDHR is of course the uncertainty regarding its enforcement. Also, the rights are generally regarded as somewhat ''vague'' and

undefined. Immediately after its adoption, therefore, the Commission on Human Rights started work on drafting two TREATIES to further define and give concrete effect to the rights in the UDHR.

For political reasons it was impossible to reach consensus on a single treaty embodying both civil/political and economic/social/cultural rights. After almost 20 years the body therefore came up with two treaties: one dealing with civil and political rights, and the other with economic/social/cultural rights.

The ICCPR was adopted by the UNGA on 16 December 1966, and opened for signature and ratification. The treaty required 35 ratifications to come into operation, and this was achieved only 10 years later, on 23 March 1976.

The basis of the binding nature of the ICCPR — unlike the UDHR — presents no problem, in theory. It is a treaty which allows for accession (over 145 states have either signed or acceded to the treaty). South Africa has signed and ratified the ICCPR.

ACTIVITY 8

Turn to the text of the ICCPR in Study Guide 2.

Study the provisions of Part II, articles 2 and 3, and summarise the duties which states undertake by becoming a party to the Covenant. (Now the hard part: internalise your summary.)

2.3.2 Rights under the ICCPR

Turn to the text of the ICCPR in Study Guide 2. Complete the following table, filling in the right in the middle column together with any special features, and the article in the UDHR in which the corresponding right appears in the end column. (Squeeze in the answers if you have to — perhaps having to squint at what you have written will get it into your head!)

- Note that the rights do not all correspond, and that more than one right may occur in a single article. The important thing here is to get the feel of the correspondence between the two documents.

ACTIVITY 9

ICCPR Article	Right and Distinctive Feature/s	UDHR Article
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You now have an idea of the rights covered by the ICCPR. As with the UDHR, it is also important to know the extent to which these rights may be legitimately limited or curtailed. This you will find in article 4.

While studying this article with great attention(!), take particular note of the following:

- the stringent requirements set in article 4(1)

- the fact that certain rights are not subject to derogation (this means limitation) — article 4(2) (know these rights: they offer good practical examples for examiners!)
- the duties on a state which derogates from the rights

These are the ''general'' qualifications applicable to all rights. There are, however, also ''specific'' qualifications — sometimes termed ''internal modifiers'' — contained within the articles in which the rights are listed. You should have picked up these qualifications when you completed the table in the previous activity. These conditions of limitation must also be borne in mind.

ACTIVITY 10

Identify certain rights in the ICCPR which are not subject to derogation.

2.3.3 Enforcement of the ICCPR

As one of the major problems with the UDHR was lack of enforcement, it stands to reason that the enforcement system devised for the ICCPR is important.

Study this section carefully based on the pointers below.

The Human Rights Committee (HRC) was established to monitor and advance the compliance of states with their obligations arising under the ICCPR — see activity 7 above.

- What is the structure of the HRC? Do the members act as government representatives? Do you think they should/should not — why?
- Study the following specific procedures within the Committee:

  (1) The reporting procedure (article 40 of the ICCPR)
  (2) General comments
  (3) Interstate communications (articles 41 and 42)
  (4) The First Optional Protocol

Note that there is also a Second Optional Protocol dealing with the outlawing of the death penalty. Read through this section, but you need not study it in detail.

2.4 THE ICESCR

2.4.1 The legal nature of the ICESCR

As we pointed out earlier, the members of the UN were unable to agree on a single treaty which would include both civil and political rights as well as economic, social and cultural rights (as was done in the UDHR).

We have just examined the treaty the Commission on Human Rights came up with to address civil and political rights (the ICCPR), and now come to the treaty adopted to address economic, social and cultural rights (the ICESCR).

The negotiating, adoption, and other procedures of the ICESCR closely mirror that of the ICCPR, although not as many states have acceded to the treaty, or ratified it. As with the ICCPR (and again unlike the UDHR), the basis on which a state is bound by the ICESCR presents no problems. It is a treaty, and as such it is binding on states who become party to it by accession and ratification.

However, the implementation of economic, social and cultural rights within a state differs considerably from the implementation of civil and political rights in purely practical terms. While it doesn't cost a state much to implement civil and political rights, the implementation of social rights can be extremely expensive, and in fact beyond the means of many poorer nations (including South Africa).

This is reflected in the ICESCR by the obligations which states acquire by becoming party to the treaty.

ACTIVITY 11

1 Turn to the text of the ICESCR in Study Guide 2.
2 Study the provisions of Part II, article 2.
3 Summarise the duties which states undertake by becoming a party to the Covenant.
4 Did you note the difference between the obligations states acquire in terms of the ICCPR and the ICESCR?
5 Can you work out why this was necessary?

Are there any obligations in terms of the ICESCR which are in fact ''immediate''?

2.4.2 Rights under the ICESCR

Turn to the text of the ICESCR in Study Guide 2. Complete the following table, filling in the right in the middle column together with any special features, and the article in the UDHR in which the corresponding right appears in the last column.

- Note that the rights do not all correspond, and that more than one right may occur in a single article. Also note that a number of the rights found in the ICESCR aren't found in the UDHR. The important thing here is to get the feel of the correspondence between the two documents.

ACTIVITY 12

ICESCR Article	Right and Distinctive Feature/s	UDHR Article
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As with the previous two instruments making up the International Bill of Rights, we also need to know the extent to which the rights you have just identified may be limited. This you will find in article 4. Note that the limitations

- must be determined by law
- cannot be against the nature of the right
- must promote the welfare of a democratic society

This is also subject to the provisions of article 5, which, as you will see, prohibit action which destroys the right, or which restricts it more than is absolutely necessary under article 4. Article 5(2) is also important — particularly from a ''problem-type-question'' point of view.

ACTIVITY 13

Compare the limitation provisions under the following three instruments

1 the UDHR
2 the ICCPR
3 the ICESCR

2.4.3 Enforcement of the ICESCR

The ICESCR neither established an international/individual complaints system nor — initially at least — a body to oversee or review reports submitted. Study Part IV, article 16, of the ICESCR for this provision. Note the following:

- The parties undertake to submit reports on their progress with the implementation of the Covenant.
- These reports follow the following route:

  State party
  UN Secretary General
  UN Economic and Social Council
  Relevant specialised agencies
  (ECOSOC)

The content of the reports is set out (in very general terms) in article 17, and the role of ECOSOC in articles 18 to 24. Summarise these provisions for yourselves.

As with the ICCPR, however, this essentially ineffective system has developed through ECOSOC practice. In 1987 ECOSOC adopted a resolution establishing the Committee on Economic, Social and Cultural Rights, a permanent body which like the ICCPR Committee consists of 18 independent members. Under the provision establishing the Committee, comprehensive reports on the progress made after implementation are required from states parties every five years.

The written report is submitted to the Committee. The Committee then prepares a list of questions based on the report and public hearings. The questions are put to the delegation from the state party, which must present the report in person. It is therefore essentially a system based on discussion and dialogue.

Once this discussion phase is over, the Committee, as a body, adopts ''concluding observations'' on the report under consideration. This contains an evaluation on the progress made by the state party, and also comments on what still needs to be done.

The Committee also makes ''general comments'' on the rights embodied in the ICESCR, thus building up a body representing a semi-official (binding?) interpretation of the rights.

ACTIVITY 14

''In fact, the Committee on Economic, Social and Cultural Rights has, in the absence of an official complaint procedure, developed its functions under the reporting procedure, to something which more and more resembles a quasi-judicial complaint procedure.''

Comment critically on this quotation, relating it to article 16 of the ICESCR.

ACTIVITY 15

Having summarised the powers of ECOSOC, go back to 2.3.3 (Enforcement of the ICCPR) above, and compare the two enforcement systems. Why do they differ so much?

REVISION EXERCISE

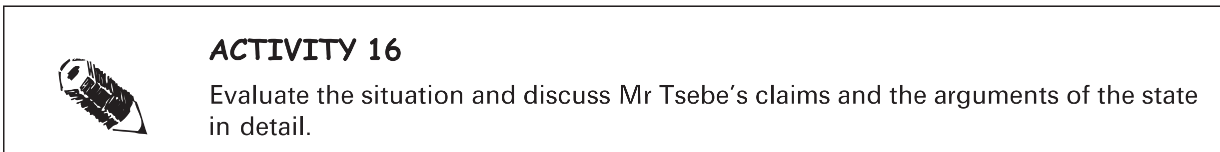
The time has come to bring all the rights together. In the first column, fill in the right (eg, the right to life). Then in the next three columns, fill in the article in which the right appears in the UDHR, the ICCPR and the ICESCR. We have made the table larger than is actually needed, and remember that all the rights will not feature in all the documents. You are expected to know these rights, as they form the basis of examination questions. They also establish *locus standi* for bringing an action for violation of a right. Have fun!

Right	UDHR	ICCPR	ICESCR

CASE SCENARIO

You are in South Africa, in the ''bad old days''. South Africa has not signed any human rights treaties, and has also on every occasion objected to international claims that basic human rights, including the freedom of movement and the right to due legal process, are customary international law rules binding on all states.

Mr Tsebe, who is from Bloemfontein, is visiting his girlfriend in Johannesburg. While walking down Commissioner Street minding his own business, he is stopped by two policemen. They demand his ''pass'', and as he is not authorised to be in the Johannesburg area, he is arrested and thrown into jail. Despite repeated requests, he is not allowed to see a lawyer. When he eventually comes before a magistrate two weeks later, he claims that South Africa is in violation of the UDHR, which binds all states as customary international law. The state argues that because South Africa isn't a party to any human rights treaties and has objected persistently to the UDHR as customary international law, Mr Tsebe's claims are without foundation.



ACTIVITY 16

Evaluate the situation and discuss Mr Tsebe's claims and the arguments of the state in detail.

3 OTHER MAJOR UN HR TREATIES

3.1 THE CERD

3.1.1 Introduction

The CERD is the first comprehensive and binding multilateral treaty concluded under UN auspices. Its adoption was preceded by a UN GA Declaration on the same subject in 1963.

The aim of this Convention is to eliminate all forms or racial discrimination.

Distinctions, restrictions or exclusions on the basis of colour, descent, national or ethnic origin are included under ''racial discrimination''.

3.1.2 State obligations

States parties are under obligation to take all relevant measures to eliminate any form of racial discrimination.

3.1.3 Enforcement

The enforcement of the CERD is left to the CERD Committee. Three main functions are entrusted to the CERD Committee:

- examination of periodic reports
- consideration of interstate communications
- examination of individual communications

The CERD Committee consists of 18 independent experts nominated and elected by member states for four years.

The Committee must consider the following three factors:

- equitable geographical distribution
- representation of ''different forms of civilisation''
- representation of ''the principal legal systems''

The CERD can be approached through the following mechanisms:

- interstate communications
- individual communications: the CERD Committee considers communications against the states that made a declaration under article 14 of the Convention
- state reporting: general recommendations and concluding observations

3.2 THE CEDAW

3.2.1 Introduction

The aim of CEDAW is to eliminate all forms of discrimination against women. It was adopted in 1979 and came into force in 1981.

3.2.2 State obligations

States are bound to report regularly to the enforcement mechanism of the CEDAW on the measures taken to eliminate all forms of discrimination against women.

3.2.3 Enforcement

Enforcement of the CEDAW is entrusted to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) which is made up of 23 independent experts elected by state parties. Its mandate is threefold:

- to examine periodic reports
- to make suggestions and general recommendations based on the examination of reports and information received from the state parties. These suggestions and recommendations are contained in the Committee's annual report to the General Assembly
- to examine individual communications

The CEDAW did not initially provide for an individual complaints mechanism. This was rectified when the Optional Protocol to the CEDAW was adopted in 1999, and came into force in 2000. States who become party to this protocol accept the right of individual petition.

3.3 THE CAT

3.3.1 Introduction

This Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT) was adopted by the UN GA in 1984 and came into force in 1987.

3.3.2 State obligations

States parties undertake to take ''effective legislative, administrative, judicial'' and other measures to combat torture. These measures must at least include adherence to the principle of non-expulsion of anyone to be subjected to torture (the principle of non-refoulement). Moreover, CAT includes the principle of universal jurisdiction through the principle of *aut dedere aut judicare*, which means that a state should either prosecute someone suspected of having committed torture, inhuman or degrading treatment or punishment, or extradite the person to another state that has jurisdiction to prosecute him or her.

States parties must submit reports to CAT within one year of ratification or accession, and every four years thereafter.

3.3.3 Enforcement

The Committee against Torture (CAT) was set up as the supervising or implementing body of the Convention. It is entrusted with four functions:

- to consider state reports (subject to making a declaration under article 21 of the CAT)
- to initiate a confidential inquiry on the basis of reliable information meeting specific criteria
- to finalise complaints by or on behalf of individuals (subject to the state making the declaration in terms of article 22 of CAT)
- to examine inter-state complaints

CAT consists of 10 experts elected for four years by states parties. They perform their functions in their personal capacities.

3.4 THE CRC

3.4.1 Introduction

The aim of the CRC is to protect children's rights. It was adopted in 1989 and came into force in September 1990.

It was supplemented by two optional protocols. The Optional Protocol on Children in Armed Conflict (CRC-AC), adopted in 2000 and which came into force in 2002, prohibited the participation of children (everyone under the age of 18) in direct hostilities or armed conflicts.

The Optional Protocol on the Sale of Children, Child Prostitution and Child

Pornography (CRC-SC), also adopted in 2000, came into force in 2002. It prohibits the sale and prostitution of children, as well as using children for pornographic purposes.

3.4.2 Obligations

States parties are under obligation to protect the rights of children (CRC), to prohibit the participation of children in armed conflict (CRC-AC), and to take the necessary measures to prohibit the sale and prostitution of children, as well as using children for pornographic purposes.

3.4.3 Enforcement

The enforcement of the CRC is entrusted to the CRC Committee, which consists of 10 members, each with recognised competence in the field of children's rights. Members are elected for four years, and may be re-elected. The CRC Committee deals with self-reporting by states parties. Individual communications are not provided for.

3.5 THE CMW

3.5.1 Introduction

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) was adopted in 1990 and came into force in 2003. Its aim is to protect migrant workers, whether documented or not, and the members of their families, against any form of exploitation. It also seeks to prevent the illegal recruitment and trafficking of migrant workers, and to discourage the irregular or undocumented employment of migrant workers.

3.5.2 State obligations

States parties are under obligation to prevent any form of exploitation of migrant workers and the members of their families.

3.5.3 Enforcement

The CMW Committee is the supervisory body of the CMW. It consists of 10 members. Its functions are as follows:

- to examine periodic reports from states
- to consider inter-state communications
- to consider individual communications (subject to states parties having made the declaration under article 77 of the CMW)

ACTIVITY 17

Identify five other major HR treaties, the obligations of a state under these treaties, enforcement mechanisms of such treaty, and their composition.

4 FEEDBACK ON SOME OF THE ACTIVITIES

ACTIVITY 1

Self-evaluation.

ACTIVITY 2

The UN Charter is a treaty that is binding on UN member states. It contains a number of provisions which stress human rights. These provisions are essentially of a nonbinding or advisory nature. They have nevertheless contributed to the development of IHRL. The UDHR, and mostly the ICCPR and the ICESCR, were adopted as treaties to give effect to the rights in the UN Charter. Although the UDHR was adopted as a nonbinding GA resolution, there is a widespread view that some of its provisions have become binding: directly, as customary international law, or indirectly, as general principles of law. As for the ICCPR and the ICESCR, there is no doubt about their binding nature as treaties.

ACTIVITY 3

Self-evaluation.

ACTIVITY 4

Self-evaluation.

ACTIVITY 5

See Study Guide 2, and fill in the table, distinguishing between civil, political and social rights.

ACTIVITY 6

The rights in the UDHR are not absolute. They may be limited by law to secure the recognition of the rights of others and to meet the just requirements of morality, public order, and general welfare in a democratic society.

ACTIVITY 7

The UDHR is not a binding treaty but a nonbinding and non-enforceable UNGA resolution. Three main arguments were however offered to establish the UDHR as a system of binding obligations, namely that

(1) the UDHR was an interpretation of the rights in the UN Charter, which is a treaty, and should be binding, like the Charter itself
(2) the UDHR had developed as customary international law, which is binding, owing to its acceptance by most of the states in the world, and that the two criteria of *usus* and *opinio iuris* which the UDHR had to meet in order to be a binding system, had been met
(3) the UDHR embodied the General Principles of Law Recognised by Civilised Nations, which are also sources of PIL in terms of article 38(1)(c) of the Statute of the ICJ

ACTIVITY 8

Self-evaluation. See text in Study Guide 2

ACTIVITY 9

Self-evaluation. See text in Study Guide 2

ACTIVITY 10

See article 4(2) of the ICCPR. Possible examination question.

ACTIVITY 11

Self-evaluation. See text in Study Guide 2

ACTIVITY 12

Self-evaluation. See text in Study Guide 2 and fill in the table.

ACTIVITY 13

Self-evaluation. An interesting question that may be selected for the forthcoming examination.

ACTIVITY 14

Self-evaluation. Comment on article 16 of the ICESR in Study Guide 2.

ACTIVITY 15

See Study Guide 2. The enforcement mechanism of the ICCPR (the HRC) and its procedures were provided by the ICCPR itself. This is not the case for the enforcement mechanism of the ICESCR, which cannot be found in the ICESCR. The body to oversee or review reports under the ICESCR was established by a resolution adopted by ECOSOC in 1987. Compare the reporting procedure and decisions under the ICCPR and the ICESCR respectively, and do not forget the revision exercise above.

ACTIVITY 16

The persistent-objector argument. According to Dugard both judicial and academic opinion support the view that a ''persistent objector'' is not bound. The question has been the subject of debate in the context of apartheid and international law. States refused to accept South Africa's persistent objection to treating apartheid as a violation of customary law. This is no longer the case, as the ''bad old days'' are effectively gone.

ACTIVITY 17

Self-evaluation. Possible examination question.

TOPIC 3

THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

1 INTRODUCTION

2 THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

2.1 Legal nature of the ECHR
2.2 Rights under the ECHR
2.3 Enforcement under the ECHR

2.3.1 Enforcement under the original ECHR
2.3.2 Enforcement under the ECHR as amended by Protocol 11

2.3.2.1 Jurisdiction
2.3.2.2 Who may bring a case?
2.3.2.3 Admissibility requirements in more detail
2.3.2.4 The role of individuals
2.3.2.5 Judgments of the court
2.3.2.6 Enforcement and the Committee of Ministers
2.3.2.7 Interpretation of the rights by the European Court

3 THE EUROPEAN SOCIAL CHARTER (ESC)

3.1 Introduction
3.2 Legal nature of the ESC
3.3 Rights under the ESC
3.4 Enforcement

3.4.1 The reporting system
3.4.2 The complaints procedure

4 FEEDBACK ON SOME OF THE ACTIVITIES

Study outcomes for Topic III

After studying this topic you will be able to:

- distinguish between universal and regional human rights documents
- identify, evaluate and discuss the provisions in the European Convention on Human Rights (ECHR), certain of its protocols, and the European Social Charter (ESC)
- analyse the contents of the ECHR and the ESC
- discuss and evaluate the enforcement mechanisms available under the ECHR and the ESC
- assess the role of the European system in the development and promotion of IHRL
- compare the rights in the EHCR, the ESC, and the International Bill of Rights

To achieve these outcomes, you will need to do the following:

- Read pages 251 to 256 of Church, Shulze and Strydom.
- Read the texts of the documents to which you are referred.
- Read the article ''A decade of Europe? Some reflections on an aspiration'' (Ian Ward pp 236–257) in *Journal of Law and Society* Vol. 30, No 2 (June 2003).
- Read the article ''Khashiyev and Akayeva v Russia et al'' (David Kaye pp 873–881) in *The American Journal of International Law*, Vol 99, No 4 (Oct 2005).
- Do the activities and make sure that you understand them.

1 INTRODUCTION

The first thing we did in Topic 2 was draw your attention to the distinction between universal human rights systems and regional human rights systems. We then discussed the United Nations system as an example of a universal system. In this topic we examine the first of the three regional human rights systems we will be considering in this course — this is the European System.

The European System is the most developed and the most sophisticated of the regional systems.

A few years after the end of WWII — on 5 May 1949 to be exact — the Council of Europe was established to ''promote European unity''. In terms of its founding statute, all state parties must accept the principle of the enjoyment of ''human rights and fundamental freedoms'' by all persons within its jurisdiction — that is, within the European states making up the Council. It was soon clear to these states that the drafting of the Human Rights Covenants (ICCPR and ICESCR — see Topic 2) which were to give practical effect to the provisions of the UDHR, would be some time in the making. Therefore one of the first tasks of the Council was to draft a human rights covenant for its member states which would have ''teeth''. In other words, an instrument embodying effective enforcement mechanisms.

This was done in record time and the ECHR was adopted on 4 November 1950, coming into force on 3 September 1953.

ACTIVITY 1

What is the difference between a universal and a regional human rights treaty? Why was it necessary for the Council of Europe to adopt the ECHR when the UDHR was already in existence (and remember that it was ascribed to by the same parties)?

2 THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

2.1 LEGAL NATURE OF THE ECHR

The ECHR was drafted by the Council of Europe and signed at Rome on 4 November 1950 by the then 15 member states of the Council. It came into force on 3 September 1953.

The ECHR is a treaty and as such creates binding obligations for member states, enforceable under international law. The legal nature of the ECHR therefore presents

no problems — it is a treaty and has full international effect after ratification. It can also have municipal effect once the formalities for the application of treaties in the municipal law of the specific states have been met. (We are saving the municipal application of treaties as a final treat in Topic 6, where we will use South Africa and the 1996 Constitution as an example.)

ACTIVITY 2

Turn back to Topic 2 and review what you learned about the legal nature of the UDHR, the ICCPR and the ICESCR. Now compare this with the legal nature of the ECHR, and explain which of these documents it most closely resembles. Why do you think this?

2.2 RIGHTS UNDER THE ECHR

Turn to the text of the ECHR in Study Guide 2 where you find the ''founding documents'' you have used and will continue to use throughout the course. Please do not take this lightly. You will only understand how important it is that you internalise this material as the course progresses. Keep in mind the founding documents of the UN system, namely the UN Charter, the ICCPR and the ICESR.

Now complete the following table, filling in the right in the centre column together with any special features, and the article of the UDHR in which the corresponding right appears in the last column.

ACTIVITY 3

This activity will give you an overall picture of the ECHR and the UDHR.

ECHR	Right & Distinctive Features of the Right	UDHR
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What do you notice from this table when you compare it to any of the three you studied in Topic 2?

Hopefully you noticed that there are not nearly as many rights covered by the ECHR as by the UDHR. Why do you think this is? Are Europeans perhaps less human (or less concerned about their rights) than other people? Or are they better people who understand all the freedoms and do not need to have it written down?

Not at all, but as we saw above, the ECHR was drafted in record time by state representatives from very differing value systems and with different priorities. Since a treaty is the product of consensus (agreement) and consensus takes time (but time was of the essence when the treaty was drafted), the original ECHR is a document of compromise including only the less controversial rights the drafters could agree on at that time. Fortunately for the Europeans, however, not everything is cast in stone.

The solution was found through the adoption of a number of protocols. Protocols are also treaties (you will remember from you general international law course that one calls call a treaty — convention, covenant, protocol — makes no difference to the nature of the instrument). Protocols are ''special'' in the sense that they relate to — either add to or amend — a specific treaty, and once adopted, form an integral part of the treaty. For example, article 5 of the first protocol adopted at Paris 1953 reads:

> Article 5 — Relationship to the Convention
>
> As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

What logical inferences can you draw from the fact that the protocols are themselves treaties and form part of the original treaty to which they refer?

- Because they are intended to form part of the original treaty (here the ECHR), only states party to the original treaty may be party to a protocol.
- However, because they are also independent treaties, the individual states must sign, or accede to, the protocols individually.
- This also means that a state which is unwilling to accord its ''humans'' the rights (or certain of the rights) in a specific protocol, need not sign it — but may still be a party to the broader ECHR. This may be a compromise, but some rights are better than none — which would be the alternative. Note however that this is merely a ''rule of thumb'' (a general rule), and certain protocols may be compulsory.

Well, let's see if we can improve the destiny of the Europeans as it was embodied in the original ECHR. The protocols make interesting reading and in themselves trace the development of the human rights movement. We will not deal with all the protocols here. Those adding important new rights to the original text of the ECHR will be dealt with in table form below. Complete the tables as you did in Activity 3 above.

ACTIVITY 4

Turn to **Protocol 1** (Paris Protocol 1952) and start working!

Protocol	Right & Special Features	UDHR
1		
2		
3		

Now turn to **Protocol 4** (Strasbourg 1963) and do the same.

Protocol	Right & Special Features	UDHR
1		
2		
3		
4		

Turn to **Protocol 6** (Strasbourg 1983) and do it again.

Protocol	Right & Special Features	UDHR
1		
2		

Turn to **Protocol 7** (Strasbourg 1984).

Protocol	Right & Special Features	UDHR
1		
2		
3		
4		
5		

Keep going: you're almost there! Turn to **Protocol 12** (Rome 2000) and fill in the provisions of article 1 in the space provided below. Compare this article with article 14 of the original convention.

....

....

....

....

....

....

You now have a full picture of the rights covered by the ECHR and its protocols.

It is also, however necessary, as with the other human rights instruments, to know the extent to which these rights may be curtailed or limited, so back to the drawing board!

ECHR: Articles 15–18 — summarise these articles and know the restrictions they impose. We would suggest that where specific provisions apply to certain articles (eg article 2 in terms of article 15(2)) you include these provisions under the ''special features'' in your summary of the rights in the table in Activity 3.

PROTOCOL 4: There are no separate derogation articles in the protocol, but there are ''internal modifiers'' (see Topic 2 point 3.3.2). You did notice this and insert them in your table under ''special features'', didn't you? If not, do so now. (An example is article 2(3) — freedom of movement.) Remember, however, that all the rights in the protocols are also subject to the general limitation clauses in the original ECHR.

PROTOCOL 6: Articles 3 and 4. Again summarise and insert them in your table.

PROTOCOL 7: Again there is no specific limitation clause, but check whether there are any ''internal modifiers''.

PROTOCOL 12: This is an interesting one in that the preamble contains a limitation of sorts — and a very wide one at that! See if you can spot it. (You couldn't? — Read the last paragraph of the preamble again!)

ACTIVITY 5

Write a paragraph explaining the limitations permitted in respect of any three of the rights in the ECHR or its protocols. Now think of a practical example (a set of facts) of where a state has limited each of these rights. Test it against your explanation to see whether it is valid. Now, to complicate matters even further, take three different rights and write scenarios where the limitations will not be valid.

You may have found the last part of Activity 5 rather unfamiliar, but it is something you will actually enjoy doing and which we would really like you to try. The best way to test whether you understand something is to think up a practical scenario in which you set out the problem you have been grappling with. The more outlandish the better in the sense that you will then remember it — but also bear in mind that the more complicated you make it the more likely you are to trip yourself up — so it might be better to keep it simple.

Although this is letting out trade secrets, how else do you think we set problem questions in the exam? So what I am actually asking you to do is set an exam question. You can always try it and then e-mail it to us (or phone or write) and see if we can solve it — but please, only one, not one hundred!

2.3 ENFORCEMENT UNDER THE ECHR

The most complex but also the most important part of the ECHR is also the area where the Convention has contributed most to the development if IHRL, and this is its enforcement.

You will remember that the UDHR had virtually no enforcement mechanisms, that the ICCPR, while marginally better, also doesn't really go far enough, and likewise, the ICESCR. The ECHR, however, was designed specifically to fill this gap.

The original enforcement mechanism created in the ECHR was replaced in 1994 by Protocol 11. The version of the ECHR which you will find in Study Guide 2 embodies the changes brought about by this Protocol and is the one which you are expected to master for purposes of this course.

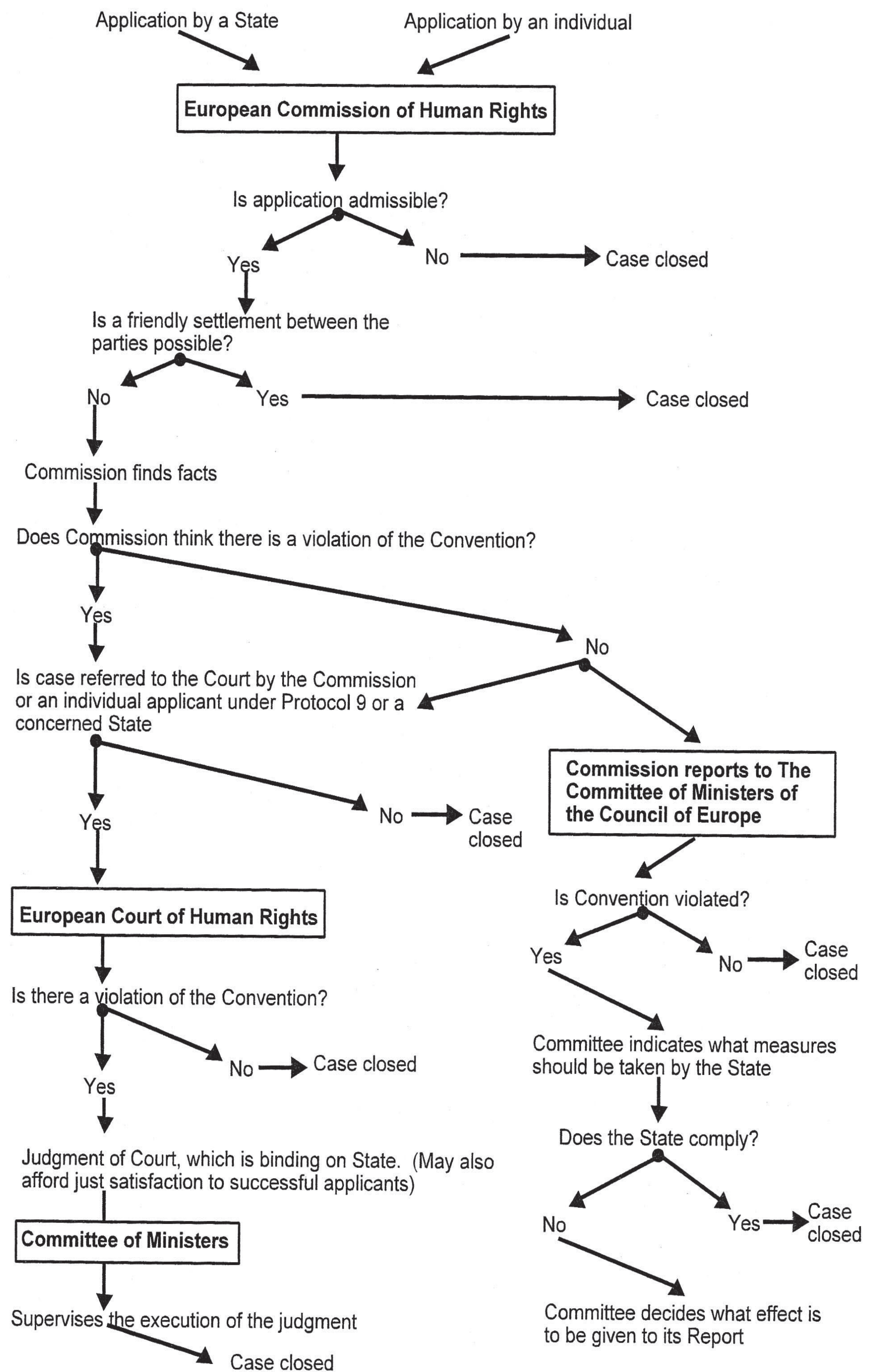
2.3.1 Enforcement under the original ECHR

The ''new'' system was based on the old one, and so it is necessary to have at least a basic background knowledge of the old system. What we have decided to do is to insert a diagram illustrating how the old system worked. Study the diagram. You should have a broad understanding of:

- the various bodies created under the system
- their functions and powers
- how the system worked.

Our goal here is to understand the system in broad outline so that we can better understand the current system and its working. You may of course also come across cases decided under the old system which you will not be able to follow if you don't know how it worked.

This table is taken from Alastair Mowbray's *cases and materials on the European Convention on Human Rights* (Butterworths 2001 at p 2) which you can read if you want a fuller background. This work is not prescribed and we do not expect you to study it for the examination.


Application by a State
Application by an individual
European Commission of Human Rights
Is application admissible?
Yes
No
Case closed
Is a friendly settlement between the parties possible?
No
Yes
Case closed
Commission finds facts
Does Commission think there is a violation of the Convention?
Yes
No
Is case referred to the Court by the Commission or an individual applicant under Protocol 9 or a concerned State
Yes
No
Case closed
Commission reports to The Committee of Ministers of the Council of Europe
Is Convention violated?
Yes
No
Case closed
European Court of Human Rights
Is there a violation of the Convention?
Yes
No
Case closed
Committee indicates what measures should be taken by the State
Does the State comply?
No
Yes
Case closed
Judgment of Court, which is binding on State. (May also afford just satisfaction to successful applicants)
Committee of Ministers
Supervises the execution of the judgment
Case closed
Committee decides what effect is to be given to its Report

2.3.2 Enforcement under the ECHR As amended by Protocol 11

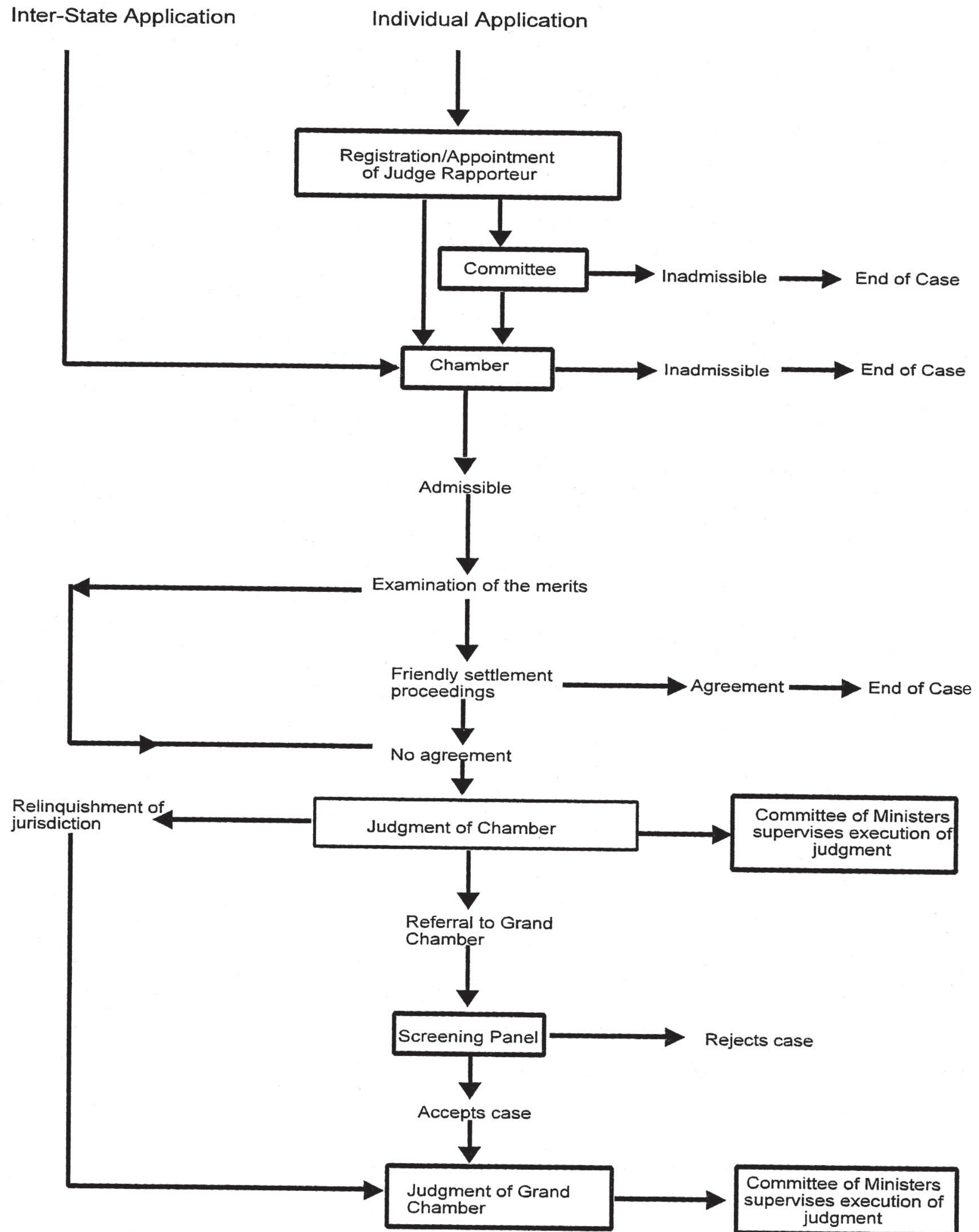
Again we will start off with a diagram, once more taken from Mowbray (see above).

Use this diagram to guide you through section II of the ECHR: "European Court of Human Rights", articles 19–55.

Make sure that you are able to explain the following aspects:

2.3.2.1 Jurisdiction

Subject matter jurisdiction: the interpretation and application of the ECHR and its protocols.



Distinguish between:

A. Contentious jurisdiction — articles 33 & 34

(the power to hear and decide a case between to contending parties)

can be brought by either

A contracting party (state)	**OR**	**An individual victim**
Against		Against
another contracting party		A contracting party

for the violation of the ECHR

AND

B. Advisory jurisdiction — article 47 (introduced by Protocol 2)

(the power of the court to give advisory opinions)

can only be brought by

Committee of Ministers

article 47(1)	article 47(2) excludes
legal questions on interpretation of ECHR	all matters within contentious jurisdiction

2.3.2.2 Who may bring a case?

Distinguish between:

Inter-state complaints

- How is jurisdiction founded?
- What are the admissibility criteria?
- Why don't states often do this?

Private petitions

- How is jurisdiction founded?
- Role of Protocol 11?
- Must victim have a personal interest?
- Study article 35

ACTIVITY 6

Compare the general admissibility requirements for inter-state complaints with those for individual petitions.

2.3.2.3 Admissibility requirements in more detail

Under the previous heading we looked at the admissibility requirements in broad terms. As admissibility is a key concept in bringing any case, it is necessary to examine these requirements in greater detail.

The requirements for admissibility are set out in article 35 — study this article in detail.

Distinguish between and be able to explain the rejection of jurisdiction based on:

Article 35(3)	**Article 35(1)**
incompatibility with the ECHR (and protocols)	exhaustion of domestic remedies
application is ill-founded	six month rule
application represents an abuse of rights	

ACTIVITY 7

Think up a scenario (set of facts) illustrating a case in which the court would refuse to admit a case on the basis of the two grounds set out in article 35(1).

2.3.2.4 The role of individuals

Here you must ensure that you are able to trace the role of the individual in proceedings before the court.

ACTIVITY 8

Turn back to Topic 1 and revise what was said about the characteristics of IHRL and the evolution of the individual as a subject of IHRL and PIL in general. Now assess how what you have just learned of the role of the individual before the European Court can be assimilated into this discussion.

2.3.2.5 Judgments of the court

Look at the diagram above and the provisions of Section II of the ECHR. Make sure that you are able to follow the route of a case through the court.

2.3.2.6 Enforcement and the Committee of Ministers

As you will see from the diagram, once the court has issued a judgment, it is up to the Committee of Ministers to ensure that the judgment is complied with. Article 46 reads:

> 46(1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
> 46(2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

We hope you noticed that this provision is rather vague: no provision is made in respect of the way in which the Committee should ensure compliance. The actual procedure is contained in rules adopted by the Committee to govern this article.

ACTIVITY 9

Rule 1 provides ....

Rule 2 provides ....

Think along the following lines:

- What problems are encountered by the Committee when trying to meet its obligations under the ECHR?
- Would it make a difference if the court found that monetary compensation is due or that national laws should be amended? Why is this?
- How has the Committee attempted to resolve its problems?

2.3.2.7 Interpretation of the rights by the European Court

Study this section on your own. Unfortunately the scope of the course forces us to concentrate on systems as a whole rather than on the application of individual rights.

3 THE EUROPEAN SOCIAL CHARTER (ESC)

3.1 INTRODUCTION

As the United Nations did with the ICCPR and the ICESCR (see Topic 2), and for much the same reasons, the Council of Europe also adopted a two-pronged approach to human rights protection by separating civil and political rights (in the ECHR) from economic, social and cultural rights (in the ESC).

The ESC has a reasonably involved history of amendment and revision, but here we concentrate on the ''revised'' ESC, which you will find in Study Guide 2.

The internal structure of the ESC is very complex.

- Part I sets out 31 rights in general terms.
- Part II defines and qualifies these rights.
- Part III lists what a state undertakes by becoming a party to the ESC.
- Part IV deals with the implementation.
- Part V deals with limitations and derogations.
- Part VI deals with the formal aspects of the treaty.

The Appendix deals with the scope of the Convention in relation to the persons protected.

3.2 LEGAL NATURE OF THE ESC

The ESC is a treaty and as such creates binding obligations for member states, enforceable under international law. The legal nature of the ESC therefore presents no problems — it is a treaty, has full international effect after ratification, and can have municipal effect once the formalities for the application of treaties in the municipal law of the specific states have been met.

ACTIVITY 10

Turn back to Topic 2 and review what you learned about the legal nature of the UDHR, the ICCPR and the ICESCR. Now compare this with the legal nature of the ESC and explain which of these documents it most closely resembles. Why do you feel this way?

3.3 RIGHTS UNDER THE ESC

Turn to the text of the ESC in Study Guide 2.

Complete the following table, filling in the right found in Part 1 of the ESC in the second column, any special features found in Part II in the next column, and the article of the UDHR in which the corresponding right appears in the last column.

ACTIVITY 11

ESC	Right Part I	Special Features Part II	UDHR
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			

18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
29			
30			
31			

Again it is necessary to look at the provisions which allow restrictions on these rights.

Here you must turn to Part V and study the following articles:

Article F allows for derogation in times of war or public emergency. What requirements are set for limiting rights under these circumstances?

Article G is a general derogation clause. Apart from allowing limitations specified in the articles themselves (internal modifiers which you inserted in the tables, we hope!) other limitations are allowed only where certain conditions have been met. What are the six possible grounds for limitation?

ACTIVITY 12

Compare the grounds for limitation permitted by the ECHR and the ESC.

3.4 ENFORCEMENT

Part III of the ESC spells out the obligations of the parties. Again these are very complicated. The reason for this is to allow states various options. Again the principle would appear to be: ''rather some obligations than no obligations'' — half a loaf is better than no bread!

ACTIVITY 13.1

Turn to Part III, article A(1)(a). Consider the following phrases

- ''a declaration of ... aims''
- ''pursue by all appropriate means''

Do you think that states have enforceable obligations on the basis of these two phrases? What other document (in Topic II) does this remind you of?

ACTIVITY 13.2

Article A(1)(b) lists nine articles in PART II, of which states must accept six. From which rights may a state choose?

Part II Article	Right to which state may choose to be bound

ACTIVITY 13.3

Summarise Part III, article 1(c) indicating the further articles or paragraphs by which a state must be bound.

....

....

Having established by which rights a state party must or is prepared to be bound, we must ask how these undertakings are enforced. Here the text you are working with merely refers to the original ESC where the procedure is laid out in Part IV, articles 21–29. However, as you will gather, matters are in a state of change and practical reality

does not necessarily correspond to the procedures laid out in the ESC (revised or otherwise!).

For the purposes of this course, what follows below read with Church, Shulze and Strydom, is sufficient.

Our exposition below provides a skeleton of the two ''enforcement'' mechanisms:

- Reporting system covering Part II rights (in original ESC articles 21–29)
- Collective complaints (in Additional Protocol 1995)

3.4.1 The reporting system

Part II rights: accepted

A state reports every 2 years on domestic compliance to the Secretary-General of the Council of Europe who submits the report.

to

The European Committee of Social Rights (ESCR) considers the reports and decides whether a state has complied with its undertakings. It then reports

to

the Government Committee on Council of Europe which considers the ESCR report. It then reports

to

the Committee of Ministers which makes recommendations to states concerned.

Part II rights: not accepted

Basically the same procedure is followed, but there is no compulsory reporting period.

Reports dealing with specific rights are requested by the Committee of Minsters of the Council of Europe at times and in the form they decide.

The important point to note in this regard is that although the reporting procedure appears (and is) overly involved, the end result is a recommendation. Is this an effective enforcement mechanism in your view?

3.4.2 The complaints procedure

The complaints procedure is contained in Additional Protocol 1995 which provides for a system of collective complaints. Again, although it is a long and cumbersome process, the end result is largely unsatisfactory in that the findings are recommendatory rather than peremptory.

Complaints are directed to the Secretary General and may be made by:

- international organisations of employers and trade unions (article 1(a))
- other listed non-governmental organisations (article 1(b))
- representative national organisations of employers and trade unions in the state against which complaint is made (article 1(c)

Complaints must:

- be in writing
- relate to a provision of the ESC accepted by the state against whom it is made
- indicate how that state is failing to apply the provision (article 4)

The Secretary General acknowledges receipt and sends the complaint to

- the state concerned
- the Committee of Independent Experts (article 5)

The Committee of Independent Experts may

- request written information on admissibility from the state and the complainant (article 6)
- if admissible, notify the state and request it and the complainant to submit all documentation; other parties to the Protocol may also submit comments (articles 7(1)(2) and (3))
- organise a hearing with the parties if necessary (article 7(4))

Having obtained all the information, the Committee of Independent Experts

- draws up a report describing steps taken to examine the complaint
- gives advice on whether the state is in violation of the provision complained of [article 8(1)]
- sends its report to the Committee of Ministers, to the complainant, and to the parties to the ESC [article 8(2)]

The Committee of Ministers, on receiving the report, shall, where a violation has been found,

- adopt a recommendation addressed to the state concerned

The state against whom the complaint was lodged and to whom the recommendation was addressed must report on steps taken to remedy the situation in its next report under the reporting procedure described under the reporting system above.

ACTIVITY 14

Compare and assess critically the value of the reporting and complaints procedures under the ESC.

CASE SCENARIO (THIS IS A TYPICAL CASE SCENARIO QUESTION THAT COULD BE ASKED IN THE EXAMINATION)

France, the Netherlands and the United Kingdom are states bound by the ECHR and the ESC. They are also parties to the various human rights treaties. During the last elections held in the Netherlands a politician made statements regarding the headscarf worn by Muslim women according to their religious beliefs. He moved to ban the wearing of headscarves by Muslim women.

Two French women wore the headscarf while teaching in British state schools. The women were dismissed from their positions. The state schools said that the wearing of headscarves was against the ethos of the European community at large. In addition they stated that when women don the headscarf, they ally themselves with terrorist activities in that they openly demonstrate their support thereof. France allows the wearing of headscarves, stating that the wearing of headscarves does not interfere with the teaching.

These two women categorically stated that they had no alliance with terrorist

activities. Nor did they ascribe to the values of such organisations. They further stated that they don the headscarf on religious grounds.

The women wish to bring the matter before the ECHR and the ESC. They also wish the European Teachers Union, and NGO, to bring their matter forward. Both claim that the British government has failed to comply with the provisions of the ECHR, the ESC, the UDHR, the ICCPR and the ICESCR.

The United Kingdom claims that the women lack locus standi *before any of these institutions.*

ACTIVITY 15

Based on the above case scenario, answer the following questions:

1 Identify the provisions of the ECHR and the ESC that may have been violated, and compare the rights infringed in these two instruments.
2 Discuss whether the ECHR and the ESC are universal human rights documents, and whether they are as binding as the UDHR, the ICCPR and the ICESCR.
3 Will a country such as Morocco be bound by the provisions of the ECHR or the ESC?
4 Discuss the admissibility requirements pertinent to (a) the two Muslim women and (b) the Teachers Union. NB. Please bear in mind the different legal personalities.
5 Discuss the doctrine of the ''margin of appreciation''.
6 Discuss the relationship, if any, between the Court and the Commission under the European human rights system.

4 FEEDBACK ON SOME OF THE ACTIVITIES

ACTIVITY 1

A human rights treaty is open to all states in the world, which may then become parties to it. This is generally the case with human rights treaties adopted with the UN, for example the ICCPR and the ICESCR. A regional human rights treaty, on the other hand, is open to states which belong to a particular ''region'' of the world, such as Africa, Europe and the Americas. Examples of regional human rights treaties include the ACHPR (for Africa) the ECHR (for Europe) and the AmCHR (for the Americas).

European states within the Council of Europe adopted the ECHR to give effect to the rights in the UDHR and provide for enforcement mechanisms. These mechanisms did not exist under the UDHR. Human rights treaties such as the ICCPR and the ICESCR, which give practical effect to the provisions of the UDHR, had not been adopted. So the European countries could not wait. Thus they adopted the ECHR on 4 November 1950.

ACTIVITY 2

See Activities under Topic 2. The ICCPR and the ICESCR are treaties and directly binding on member states. The UDHR, as a GA resolution, is not a treaty. (Do you remember the requirements for establishing a treaty?) Nor is it directly binding,

except for certain considerations, as you have seen in Topic 2. As a human rights treaty binding on state parties the ECHR resembles the ICCPR and the ICESCR — and most closely the former, which also makes provision for civil and political liberties.

ACTIVITY 3

See in Study Guide 2 the UDHR and the ICESCR. Under ''Rights and distinctive features'', highlight the right concerned and state whether it is a civil, political, social or cultural right.

ACTIVITY 4

See in Study Guide 2 the UDHR, the ECHR and extracts from Protocols 1, 4, 6, 7 and 12 to the ECHR.

ACTIVITY 5

Self-evaluation. Write scenarios where the limitations in respect of rights in the ECHR or its protocols will be valid or invalid.

ACTIVITY 6

Self-evaluation. See in Study Guide 2 the ECHR article 35, Protocol 11 to the ECHR, and write down the answer to this question, which is likely to feature in the examination.

ACTIVITY 7

Self-evaluation.

ACTIVITY 8

Look at activities under Topic 1. The role of the individual before the European Court illustrates the important position taken up by the individual in PIL. It also signals the emergence and development of IHRL as an important branch of PIL.

ACTIVITY 9

Self-evaluation. Find the two rules and write them down.

ACTIVITY 10

See comments under Topics 1 and 3. The ESC is a binding treaty like the ICCPR and ICESCR, unlike the UDHR. It therefore resembles the ICCPR and the ICESCR, most closely the latter, which also entrenches social rights.

ACTIVITY 11

See in Study Guide 2 the UDHR and the ESC. Complete the table.

ACTIVITY 12

Self-evaluation. See in Study Guide 2 the ECHR and the ESC.

ACTIVITY 13.1

The ESC reminds us of the ICESCR. States have undertaken enforceable obligations. However, economic, social and cultural rights differ considerably from civil and political rights. The implementation of the economic, social and cultural rights is more expensive, and in fact beyond the means of many poorer nations. Also, states are not bound to implement these rights with ''immediate effect'': they commit themselves to only taking the necessary steps or measures. (Thinking of SA Constitutional law, are you? If not, you should see the resemblance.) These obligations seem to be ''obligations of means'' rather than ''obligations of result''.

ACTIVITY 13.2

See in Study Guide 2 the ESC. Complete the table.

ACTIVITY 13.3

Self-evaluation. Summarise this article yourself.

ACTIVITY 14

Self-evaluation. Be aware that this may make an interesting question for the examination.

ACTIVITY 15

Self-evaluation. See warning on Activity 14!!!!

PLEASE COMPLETE THESE ACTIVITIES IN FULL. THEY ARE MEANT TO PROVIDE A SUCCINT SUMMARY OF PRACTICAL DIFFICULTIES A HUMAN RIGHTS LAWYER WOULD ECNOUNTER. THESE ARE REALLY THE ISSUES WHICH CROP UP ON A REGULAR BASIS WHEN STUDYING THE EUROPEAN SYSTEM. YOUR FEEDBACK WILL BE GIVEN TO YOU IN SATELLITE BROADCAST SESSIONS DURING THE COURSE OF THE SEMESTER. THE ACTIVITIES WHICH FOLLOW ARE ALSO INTENDED TO PROVIDE A ''BASIC PREP'' FOR YOUR EXAMINATION. YOUR EXAMINATION QUESTIONS WILL BE BASED ON PROBLEM TYPE SCENARIOS. THEY WILL, HOWEVER, REQUIRE YOU TO DRAW UPON THE BASIC THEORETICAL FRAMEWORK.

ACTIVITY 16

What is the ECHR? Why are regional instruments necessary?

ACTIVITY 17

What is the basis for jurisdiction? What types of jurisdiction are there in the ECHR? Discuss the provisions pertaining to ''contentious'' and ''advisory jurisdiction''.

ACTIVITY 18

What is *locus standi*? Who has the ability to come before the ECHR? In what instances? What are the procedures for standing before the ECHR?

ACTIVITY 19

Discuss the provision which deals with ''admissibility'' to the ECHR. Distinguish between articles 35(1) and 35(3)

ACTIVITY 20

What are the ''remedies'' or ''enforcement mechanisms'' of the ECHR?

TOPIC 4

THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

1 INTRODUCTION
2 THE CHARTER OF THE ORGANISATION OF AMERICAN STATES (COAS)

2.1 Introduction
2.2 Nature of the COAS
2.3 Rights under the COAS
2.4 American Declaration on the Rights and Duties of Man (RDM)

2.4.1 Nature of the RDM

2.5 Re-evaluation of the rights under the COAS
2.6 Enforcement mechanisms under the COAS system
2.7 Commission practice under the COAS

3 THE AMERICAN CONVENTION ON HUMAN RIGHTS (AmCHR)

3.1 Introduction
3.2 Nature of the AmCHR
3.3 Rights enshrined in the AmCHR
3.4 Enforcement under the AmCHR system

3.4.1 Inter-American Commission on Human Rights
3.4.2 Inter-American Court of Human Rights

3.4.2.1 Jurisdiction
3.4.2.2 The power of the Court in contentious cases
3.4.2.3 The power of the Court to order provisional measures
3.4.2.4 The advisory jurisdiction of the Court
3.4.2.5 The jurisprudence of the Court

4 FEEDBACK ON SOME OF THE ACTIVITIES

Study outcomes for Topic IV

After studying this topic you will be able to:

- identify, evaluate and discuss the provisions in the COAS, the American Declaration on the Rights and Duties of Man (RDM), and the AmCHR
- analyse and discuss the contents of these documents
- discuss and evaluate the enforcement mechanisms available under them
- assess the role of the American system in the development and promotion of IHRL
- compare the rights enshrined in the COAS, the RDM and the AmCHR and other international instruments

To achieve these outcomes, you will need to do the following:

- Study Church, Schulze and Strydom pages 256 to 259.
- Study the texts of the documents to which you are referred.
- Ensure that you understand the activities, and that you do them.
- Read the article ''Improving human rights protections: Recommendations for enhancing the effectiveness of the Inter-American Commission and Inter-American Court of Human Rights'' (Dinah Shelton, pp 323–337) *American University Journal of International Law and Policy* 1998.

1 INTRODUCTION

The ''trick'' with the Inter-American system is to identify from the start how the various documents fit together. Although it may appear very involved, we will get there if we work through the activities, the documents, and your other reading.

We will be discussing the following three basic documents:

- the Charter of the Organisation of American States (COAS)
- the American Declaration on the Rights and Duties of Man (RDM)
- the American Convention on Human Rights (AmCHR)

The Inter-American system can be divided (roughly as there is an overlap) into two basic systems:

- the system focused on the COAS and which is binding on all OAS states
- the system focused on the AmCHR and which binds only states party to the Convention

2 THE CHARTER OF THE ORGANISATION OF AMERICAN STATES (COAS)

2.1 INTRODUCTION

Read through your text and make sure that you are able to discuss the legal and political considerations which contributed to the development of the system. This correlates with the nature of the OAS and its development. Note the period during which the Charter was drafted and when it came into force. What other important document have you studied which parallels (more or less!) this period of development in IHRL?

2.2 NATURE OF THE COAS

The OAS is a REGIONAL intergovernmental organisation of which all 35 states making up the Americas are members. Points to note here:

- ''American'' in this instance means sovereign states of the Americas — not the states of the United States of America. This may seem obvious but you would be surprised at the amount of confusion this basic fact causes.
- Do you remember the difference between regional and universal instruments? See Topic 3.
- Is a Charter a treaty? What other Charter have we worked with — you don't remember? Go back to Topic 2.

The COAS is therefore a multilateral regional treaty creating an international organisation. As such it is binding on the member states and fully enforceable against them. Like its universal counterpart, the COAS was not primarily aimed at the development or protection of human rights. However, again like the UN Charter, the recognition that IHRL would in time be a force to be reckoned with emerges from the COAS.

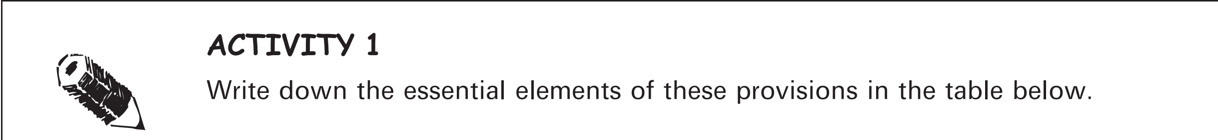
2.3 RIGHTS UNDER THE COAS

Read through the following articles of the COAS which you will find in Study Guide 2:

Preamble — read the whole preamble and ''spot the references''!

Article 3(l) — previously article 3(j) in the original/unamended Charter

Article 17 — previously 13 in the original/unamended Charter



ACTIVITY 1

Write down the essential elements of these provisions in the table below.

OAS Charter Provision	Key elements
Preamble	Convinced that the historic mission .... Confident that the true significance ....
Article 3(l)	
Article 17	

Now look at these elements. Do they define the human rights to which the states are striving? In other words, can you, from this document alone, define the human rights protected by the COAS as we have done with the documents in the previous topics?

We hope your answer to the exercise above was no! What, therefore, should we do now? Let's use our brains a bit and actually try to work this out!

ACTIVITY 2

Turn back to Topic 2 and what we learned about IHRL in the Charter of the UN. Now consider again what you have just learned about the Charter of the OAS. And now the challenging (and practical) part of the exercise. Compare the nature of the two Charters: What were they trying to achieve, and how did they set about this? What is the general approach to human rights emerging from each?

We are sure that you have come to the conclusion that the two documents are essentially similar in aim, structure, bodies created, and in their general and non-specific approach to human rights. Particularly this latter point is important.

Now ask yourself the question: ''How did the UN set about remedying this?'' If you can't come up with the answer, back you go to Topic 2. (We know that all this paging backwards and forwards might be irritating, but you will remember what you find — if only to avoid doing it again!) Right, have you come up with the Universal Declaration of Human Rights? Revise it.

This is exactly the point that the member states of the OAS reached — although as you may have noticed, they did so before the Universal Declaration appeared! They realised that the vague reference to ''fundamental rights'' and ''universal morality'' didn't actually mean much in practical terms, and that to have effect these terms would have to be defined — and so we get the American Declaration of the Rights and Duties of Man (RDM).

2.4 AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN (RDM)

2.4.1 Nature of the RDM

Adopted at the ninth International Conference of American States on 2 May 1948, the RDM is a non-binding conference resolution which was not intended to create binding rights and obligations. It was a code of how states should behave — the aspirations of states.

What other document have we dealt with which is a comprehensive code of rights but is non-binding? As we saw in the previous section, it's the UDHR. Turn back to Topic 2 and revise the arguments raised in support of the claim that the UNHR has developed into binding law.

If you examine the history of the RDM, you will find a similar development. In the case of the RDM, however, the matter was settled by the Inter-American Court of Human Rights, in its *Advisory Opinion OC-10/89, I-A CHR Ser A, Judgments & Opinions 10*, when it held that:

> [f]or member states of the Organisation [and remember this is all 35 states of the Americas] the Declaration is the text that defines the human rights referred to in the Charter ... [T]he Declaration is ... a source of international obligations ...

The Declaration is therefore for all intents and purposes part of the COAS, and it is to the RDM that one must turn to find the rights protected in the Charter.

ACTIVITY 3

Critically compare the binding nature of the RDM and that of the UDHR, and explain the relevance of the RDM to the COAS.

2.5 RE-EVALUATION OF THE RIGHTS UNDER THE COAS

We are, in the light of the above, now able to identify the specific rights protected by the COAS. Turn to the RDM in Study Guide 2 and complete the following table. Again don't forget to include any special features in the second column, and the corresponding right in the UDHR in the final column.

ACTIVITY 4

COAS/ RDM	Right & Special Features	UDHR
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		

18		
19		
20		
21		
22		
23		
24		
25		
26		
27		

You will notice that, unlike the other documents we have examined, the RDM includes ten duties. Complete the following table:

COAS/ RDM	**Duties & Special Features**
28	
29	
30	
31	
32	
33	
34	
35	
36	
37	

Article 38 of the Declaration deals with the scope of the rights and duties embodied in the document. It is therefore to this section that you must turn to establish the extent to which the rights/duties may be curtailed or limited. This article contains the following ''qualifiers'':

- the rights of others

- the security of all
- the just demands of the general welfare
- the advancement of democracy.

ACTIVITY 5

Take any two of the rights and any two of the duties and think up a scenario (a set of facts) for yourself in which you sketch a justified limitation applying one of the grounds for limitation identified above for each of the rights/duties.

Remember that there are no ''right'' or ''wrong'' answers here. The object of the exercise is to imprint the limitations on your mind!

2.6 ENFORCEMENT MECHANISMS UNDER THE COAS SYSTEM

Study the development of the Inter-American Commission on Human Rights as set out in Church, Schulze and Strydom. Of particular importance here are articles 53(e) and 106. What functions are assigned to the Commission in terms of article 106? Make sure that you can answer the following questions:

ACTIVITY 6

1 What powers are listed in article 106(1)?

....

....

2 What further instrument was provided for in article 106(2)?

....

3 What does article 145 provide in respect of the interaction between the Commission and the instrument you identified in your previous answer?

....

....

....

....

4 What are the implications for the work of the Commission?

....

....

....

....

Given your findings in activity 6, you will realise that the Commission functions on two levels:

- as a COAS organ (article 41(a)–(e) and (g)), where it is applicable to all COAS members
- as an organ of the AmCHR organ (articles 41(f) and 44–51), in which case it applies only to states party to the AmCHR

2.7 COMMISSION PRACTICE UNDER THE COAS

Read through and ensure that you understand the introductory section here. Also relate the various activities to the powers conferred on the Commission (read section 106 of the COAS). The two most important functions, however, are the following:

(1) **Country studies/on-site investigations**. Ensure that you understand and can explain the processes when the commission fulfils this function.

ACTIVITY 7

Write short notes for yourself on the following aspects:

1 Who institutes such a study and on what basis?
2 Can you describe the processes followed in a typical study/investigation?
3 Make sure you are aware of the obligations on the state which is being investigated.

(2) **Individual petition**. Note that the right of individual petition was initially restricted to the ''preferred freedoms'' in article 9*bis* of the original statute.

ACTIVITY 8

List the six preferred freedoms of article 9*bis* in the spaces below:

1 ....

2 ....

3 ....

4 ....

5 ....

6 ....

Here is where you must keep your head and distinguish between the COAS system (which binds all American states party to the Charter) and the AmCHR system which binds only parties to the Convention.

Under both systems the same procedure is followed by the Commission. However, what is done with the results depends on which system is used. Under COAS, which is what we are dealing with at present, the petition proceedings end with the Commission's final report which contains:

- findings on facts
- conclusion
- recommendations.

The Commission may, or may not, publish this final report.

ACTIVITY 9 (a bit of thought!)

Identify and explain the two major weaknesses of individual petition under the COAS.

3 THE AMERICAN CONVENTION ON HUMAN RIGHTS (AmCHR)

3.1 INTRODUCTION

In our discussion of COAS you encountered the AmCHR which, as you will remember, was envisaged *inter alia* by article 106(2) where ''an inter American Convention on Human Rights'' was mentioned. This Convention was eventually opened for signature in 1969, and came into force in 1978. Some 25 members of the Organisation of American States have ratified the convention. Note that the scope of the Convention has been expanded by the Protocol of San Salvador and the Death Penalty Protocol.

3.2 NATURE OF THE AmCHR

The AmCHR is a multilateral treaty. We would love to be able to leave it at that with total confidence that you remember the implications of this statement. However, ever cynical, perhaps we should refresh our memories a bit here!

ACTIVITY 10

Of course, if we say that international law — and specifically treaty law — is consensual, your mind kicks into overdrive, doesn't it? Smiling smugly, you immediately say that this means that states are only bound by that to which they consent, and that states which do not consent, are not bound. So far, so good!

Now we apply this to the nature of the AmCHR — a multilateral treaty — and find the following:

- The AmCHR binds only parties to the Convention.
- States which have not signed the Convention are not bound.

Right, we hope we are now all clear on the nature of the AmCHR.

Before we look at the actual rights which are protected, it is important to note what obligations the states party to the Convention undertake in respect of the rights to which they have consented. Here you must examine articles 1 and 2 closely.

Article 1 deals with the obligations undertaken by a state becoming party to the Convention.

There are three basic undertakings. Fill them in below:

ACTIVITY 11

States undertake to:

- respect
- ensure
- without

Note, and remember, the definition of ''person'' in article 1(2). Can a company call for protection of rights under the AmCHR?

Article 2 deals with the domestic effect of the rights and freedoms in the Convention. In other words, the extent to which the rights/freedoms in the Convention can be used by the individual in the courts of his/her own country. Note what is provided in this article. We will be returning to this in Topic 6.

3.3 RIGHTS ENSHRINED IN THE AmCHR

As with the previous instruments we have discussed, you must be aware of the rights enshrined in the American Convention. It is a very comprehensive document embodying both civil and political rights and, after the Protocol of San Salvador, economic and social rights as well.

ACTIVITY 11½ (because its not a ''real'' activity)

What is the nature of the San Salvador Protocol? Just checking that you realised that this is also a multilateral treaty which parties must accept individually!

As we will see presently, however, the obligations placed on states differ, depending on whether we are dealing with the traditional civil and political rights, or with social and cultural rights. Enough of the general, lets get down to the ''hard work'' of actually identifying the rights.

ACTIVITY 12

Turn to the AmCHR in Study Guide 2 and complete the following table. Again we use the ''daddy/mommy'' of all human rights documents, the UDHR, as our ''control''.

AMCHR	Right and Special Features	UDHR
3		
4		
5		
6		

7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

If you examine the rights you have just identified, how would you classify them — what ''kind'' of rights are they? If you are stumped and all else fails, look at the heading under which they appear in the Convention. Yes, civil and political rights.

These are however not the only rights protected in the Convention. Turn now to chapter 3, article 26 (Lost? Look in Study Guide 2!).

ACTIVITY 13

What rights are we dealing with in article 26?

Look at the following phrases in article 26:

> *... adopt measures ... achieving progressively ... the full realization of the rights.*

If you analyse these phrases, do they place absolute duties on state parties?

Why do you think this is a realistic approach — or perhaps you don't?

What universal document we studied in Topic 2 does this remind you of?

You should now have realised that there are two distinct types of right in the AmCHR — civil and political on the one hand (chapter 2) and economic, social and cultural (chapter 3), on the other. While states undertake a positive obligation to ensure the existence and protection of chapter 2 rights, their undertaking in respect of chapter 3 rights is less compelling. The latter rights are, as with the ICESCR (yes, that was the answer to the last question in activity 13), more in the form of ideals towards which states have an obligation to work, but which are to be implemented incrementally. When you look at the states involved (many third-world South American countries with economies much like those in Africa) this distinction becomes realistic.

As with the other documents we have studied, it is necessary to establish the extent to which the rights protected in the Convention may legitimately be restricted/limited. These are set out in detail in chapter 4, articles 27–31 of the Convention (Study Guide 2 again). They offer no particular problems and you are required to STUDY them for yourselves.

An interesting provision is chapter 5, article 32, dealing with ''personal responsibilities''. It states that every human being has ''responsibilities'' (undefined) towards family, community and mankind!

3.4 ENFORCEMENT UNDER THE AmCHR SYSTEM

There are two bodies created by the Convention:

- the Inter-American Commission on Human Rights
- the Inter-American Court of Human Rights

3.4.1 Inter-American Commission on Human Rights

We have already encountered this body in our discussion of the COAS system. Heed the warning: don't confuse the Commission proceedings under the two systems.

There are two types of petition which may arise:

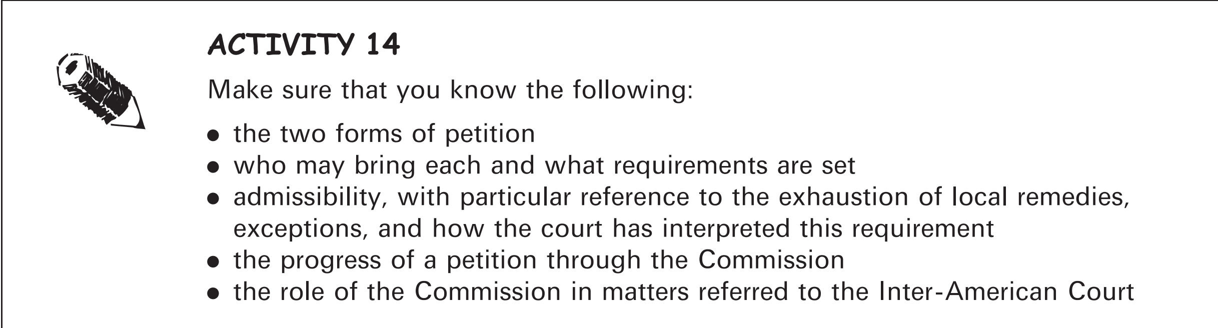
Individual Petitions — Art 44	**Inter-State Communications — Art 45**
By joining the Convention states accept that	Jurisdiction to hear complaints is not automatic
• individual • group of individuals • NGO recognised by at least one party may lodge complaints about	Both states must • ratify the Convention AND • specifically recognise the Commission's inter-state jurisdiction to consider
violations of the Convention	violations of the Convention

by a state party to the Convention	by another state party which has accepted jurisdiction — in general or on an *ad hoc* basis

Both forms of petition are subject to qualifications regarding the admissibility (whether the court will accept jurisdiction to hear the case) of the complaint. These are:

- whether domestic (local) remedies (note the exceptions) have been exhausted
- whether a time restriction of 6 months was applied
- whether the complaint amounts to a *prima facie* case under the Convention
- whether the complaint is not ''manifestly groundless or obviously out of order''
- whether it is not pending in another international settlement process

Make sure that you understand and are able to discuss the processes followed once a complaint has been found admissible.



ACTIVITY 14

Make sure that you know the following:

- the two forms of petition
- who may bring each and what requirements are set
- admissibility, with particular reference to the exhaustion of local remedies, exceptions, and how the court has interpreted this requirement
- the progress of a petition through the Commission
- the role of the Commission in matters referred to the Inter-American Court

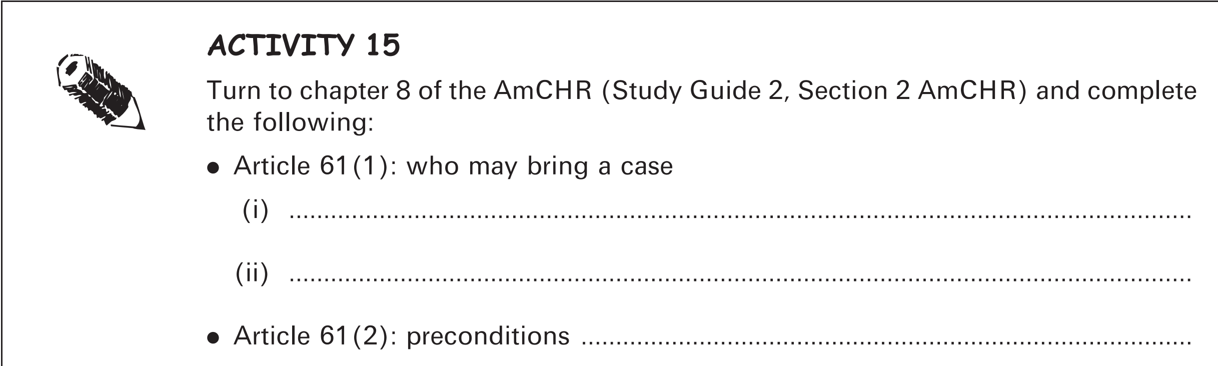
The second body under the Convention system is the Inter-American Court of Human Rights, and it is to this body that we now turn.

3.4.2 Inter-American Court of Human Rights

3.4.2.1 Jurisdiction

This aspect is dealt with in some detail in your textbooks, and is not unduly problematic. We expect you to have a thorough knowledge of this subject. Read Study Guide 2, Section 2 of the AmCHR.

The Court has both *contentious jurisdiction* and the power to give *advisory opinions*.



ACTIVITY 15

Turn to chapter 8 of the AmCHR (Study Guide 2, Section 2 AmCHR) and complete the following:

- Article 61(1): who may bring a case
  (i) ....
  (ii) ....
- Article 61(2): preconditions ....

Is the jurisdiction of the Court automatic?

- Article 62(1) ....

....

....

- Article 62(2) ....

....

....

Over what cases does the Court have jurisdiction?

- Article 62(3) ....

....

....

....

Flesh out the factual information you filled in above with an example.

3.4.2.2 The power of the Court in contentious cases

Make your own list of the powers of the Court.

Read and make sure you can discuss articles 63(1) and 68(2) on which judgments the Court may give, and article 65 on the enforcement of these judgments.

3.4.2.3 The power of the Court to order provisional measures

This is a particularly interesting provision as it allows for temporary restraining orders. The relevant provision is article 63(2). What cases are covered by this provision? Distinguish between:

- cases already serving before the Court
- cases serving before the Commission but not yet referred to the Court

Make sure that you know how the Court deals with each category.

3.4.2.4 The advisory jurisdiction of the Court

Study article 64 and identify:

- who may request advisory opinions (article 64(1))
- what the opinions cover (article 64(1) and (2))

Make sure that you can discuss the legal effect of advisory opinions.

3.4.2.5 The jurisprudence of the Court

Study this section carefully in the light of what has been said above regarding

jurisdiction and enforcement of the decisions of the Court. It is important here to see the broader picture so that you are able, using suitable examples from decisions, to evaluate the importance of the Court to the general development of IHRL jurisprudence.

CASE SCENARIO (TYPICAL EXAM QUESTION)

Peru and Cuba are member states of the Organisation of American States (OAS). They adopted both the International Bill of Rights and the RDM. They signed and ratified the AmCHR.

The Green Flag is a Libyan human rights NGO recognised by all member states of the OAS. Green Flag have offices in Havana (Cuba), Lima (Peru) and Buenos Aires (Argentina). Hasheesh Gadafi is the director of Green Flag in Havana. He has been living in Havana with his wife, Graca, who is a citizen of the United States of America (USA), for the past ten years.

In 2008 Mrs Gadafi was accused of sabotaging oil reserves projects. The American administration claimed that her husband motivated her involvement against the government of the USA. She was arrested, detained and then sentenced to death. Their two children were expelled from school. Mr Gadafi was arrested and deported to Libya with his two children.

ACTIVITY 16

As a human rights lawyer with practices in Havana and Lima you have been approached by the Cuban, US and Peruvian governments to advise them on the matter:

1 Identify the rights that have been violated with regard to the IBR, RDM and the AmCHR.
2 Compare the legal nature of the UDHR and the RDM.
3 Explain whether Peru, Cuba and the USA may all bring a case before the Inter-American Court and the Inter-American Commission for violation of rights of their citizens.
4 Discuss the requirements for admissibility of individual complaints before the Inter-American Commission.
5 Do individuals and NGOs have access to the Inter-American Commission or to the Inter-American Court?

4 FEEDBACK ON SOME OF THE ACTIVITIES

ACTIVITY 1

Complete the table with the help of Study Guide 2.

ACTIVITY 2

The background answer to this activity is given directly below it.

ACTIVITY 3

Self-evaluation. GREAT EXAM QUESTION!!! See comments on activities in Topics 2 and 3.

ACTIVITY 4

Consult Study Guide 2. Look at COAS and the RDM.

ACTIVITY 5

Self-evaluation. You may, for instance, think up a case scenario where the right to residence and movement and the right to inviolability of the home may be limited for security reasons.

ACTIVITY 6

Complete with the help of Study Guide 2.

ACTIVITY 7

See the powers of the Commission in Study Guide 2, Chapter 15 under the COAS and also the AmCHR. Also see Church, Schulze and Strydom pp 256–257.

ACTIVITY 8

See article 9*bis*.

ACTIVITY 9

ACTIVITY 9The first serious weakness is that the Court has no contentious jurisdiction to deal with the petitions, as the petitions are directed against states which are not parties to the Convention. Secondly, the GA shows little interest in dealing with individual petitions, although the Commission sends its decisions on individual petitions through to the GA.

ACTIVITY 10

The activity is to help clarify issues regarding the binding nature of the American Convention.

ACTIVITY 11½

Self-evaluation.

ACTIVITY 12

See Study Guide 2 on the UDHR and the AmCHR.

ACTIVITY 13

Economic, social and cultural rights. The document reminds us of the ICESCR studied under Topic 2.

ACTIVITY 14

Self-evaluation.

ACTIVITY 15

Consult Study Guide 2 for the AmCHR.

ACTIVITY 16

Self-evaluation. POSSIBLE EXAM QUESTION!!!!

PLEASE COMPLETE THESE ACTIVITIES IN FULL. THEY ARE MEANT TO PROVIDE A SUCCINT SUMMARY OF PRACTICAL DIFFICULTIES A HUMAN RIGHTS LAWYER WOULD ECNOUNTER. THESE ARE REALLY THE ISSUES WHICH CROP UP ON A REGULAR BASIS IN THE AMERICAN HUMAN RIGHTS SYSTEM. FEEDBACK WILL BE GIVEN TO YOU IN SATELLITE BROADCAST SESSIONS DURING THE COURSE OF THE SEMESTER. THE ACTIVITIES WHICH FOLLOW ARE ALSO INTENDED TO PROVIDE A ''BASIC PREP'' FOR YOUR EXAMINATION. YOUR EXAMINATION QUESTIONS WILL BE BASED ON PROBLEM TYPE SCENARIOS. THEY WILL, HOWEVER, REQUIRE YOU TO DRAW UPON THE BASIC THEORETICAL FRAMEWORK OF THE COURSE.

ACTIVITY 16

What is the AmCHR? Why are regional instruments necessary?

Explain the following terms as they appear in human rights documents:

1 obligation
2 respect
3 ensure
4 progressive realisation
5 margin of appreciation

ACTIVITY 17

What is the basis for jurisdiction in the inter-American system of HR? What types of jurisdiction are there in the AmCHR? Discuss the provisions pertaining to jurisdiction. Is the jurisdiction of the Court automatic? See Articles 62(1) and 62(2). What role does the Commission play in relation to the Court?

ACTIVITY 18

1 What is *locus standi*? Who may come before the American Court or Commission for HR? In what instances? What are the procedures for standing before the American Court or Commission? See Articles 61(1) and 61(2)
2 What about Articles 44 and 45 which relate to the Commission?

ACTIVITY 19

Discuss the provisions which deal with admissibility to the IACHR. Distinguish between them. Do they ''speak'' or relate to each other? See the founding document of the IACHR.

ACTIVITY 20

What are the ''remedies' or ''enforcement mechanisms'' of the AmCHR?

TOPIC 5

THE AFRICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

1 INTRODUCTION

2 THE ACHPR AND THE PROTOCOL TO THE ACHPR

2.1 Introduction
2.2 The nature of the ACHPR and the Protocol
2.3 Rights and duties under the ACHPR

2.3.1 Individual rights under the ACHPR
2.3.2 A group right under the ACHPR?
2.3.3 Peoples' rights under the ACHPR
2.3.4 Duties under the ACHPR

3 ENFORCEMENT UNDER THE ACHPR

3.1 The African Commission on Human and Peoples' Rights

3.1.1 Composition and functioning of the Commission
3.1.2 Mandate of the Commission
3.1.3 *Locus standi:* Who may approach the Commission?

3.1.3.1 Interstate complaints
3.1.3.2 Individual complaints

3.1.4 Decisions of the Commission, and enforcement

3.2 The African Court on Human and Peoples' Rights

3.2.1 Origin of the Court
3.2.2 Relationship between the Commission and the Court
3.2.3 Composition and functioning of the Court
3.2.4 Jurisdiction

3.2.4.1 Contentious jurisdiction and *locus standi*
3.2.4.2 Advisory jurisdiction

3.2.5 Powers of the Court
3.2.6 Judgments and enforcement

4 HUMAN AND PEOPLES' RIGHTS UNDER THE AU, NEPAD, AND THE APRM

4.1 Creation of the AU
4.2 AU objectives, principles, organs and human rights
4.3 NEPAD, APRM and human rights

5 FEEDBACK ON SOME OF THE ACTIVITIES

Study outcomes for Topic V

After studying this topic you will be able to

- distinguish between universal and African human rights instruments
- identify, evaluate and discuss the provisions in the ACHPR and its Protocol
- analyse and internalise the contents of these documents
- discuss and evaluate the enforcement mechanisms available under the ACHPR
- understand the possible effect of the AU on the African human rights system
- assess the role of the African system in the development and promotion of IHRL
- compare the rights in the ACHPR and the IBR

To achieve these outcomes, you will need to

- **study** the specific sections of the documents to which you are referred
- complete the activities and questions on the case scenario

1 INTRODUCTION

The ACHPR is the founding instrument of the African human rights system. However, the system has to date not functioned particularly effectively. Hopefully the establishment of the AU and the concerted efforts to achieve African unity and develop common policies and approaches, including the approach towards protection of human rights in Africa, will remedy this situation. The basic document for the African system is the African Charter, which was designed to operate originally within the context of the Charter of the Organisation of African Unity (OAU), and now the Constitutive Act of the AU.

2 THE ACHPR AND THE PROTOCOL TO THE ACHPR

2.1 INTRODUCTION

As the newest of the regional human rights systems, the African system is interesting in a number of respects. Far more than the other two regional systems we have studied the ACPHR is a product of its environment. It is therefore a document which consciously takes the traditions and aspirations of the African people which it is designed to serve, into consideration.

ACTIVITY 1

Read the preamble of the ACHPR.

1 **Write down the references to Africa and African issues in the following clauses:**

''Reaffirming the pledge ...''

....

....

....

....

''Taking into consideration ...''

....

....

....

....

''Convinced that it is henceforth essential ...''

....

....

....

....

''Conscious of their duty ...''

....

....

....

....

''Firmly convinced of their duty ...''

....

....

....

....

2 **On the basis of the references you identified in 1, write a paragraph** (about 15 lines) on how the preamble to the ACHPR illustrates that the African approach to human rights is a product of the past of the continent.

3 **Identify three elements in the preamble** which would substantiate the claim that the universal rather than the regional human rights instruments we have discussed so far were particularly influential in the drafting of the ACHPR.

2.2 THE NATURE OF THE ACHPR AND THE PROTOCOL

The ACHPR, which was adopted by the OAU in 1981, was ratified by 53 OAU members, and came into operation on 21 October 1986.

On 10 July 1998 the 34th OAU Summit of Heads of State and Government adopted the Protocol to the ACHPR on the establishment of an African Court on Human and Peoples' Rights. The Protocol came into operation on 25 January 2004, following the deposit of fifteen instruments of ratification or accession according to its Article 34 (3). By 14 July 2006 twenty-three African states had already ratified or accessed to this Protocol, but their number is still small compared to those states which ratified or accessed to the ACHPR.

The ACHPR and the Protocol on the establishment of an African Court on Human

and Peoples' Rights share the same legal nature. Both are multilateral regional treaties binding on, and enforceable against, all states party to it.

Originally designed to operate within the framework of the OAU, the system continues under the auspices of the AU.

ACTIVITY 2

Make sure that you remember the difference between a universal and a regional treaty, and that you know what the implications of the conclusion of a multilateral regional treaty are.

As we dealt with these aspects in our discussion of all the previous systems, we shall not repeat them here. Revise these aspects, and ensure that you can apply them within the African context as well.

2.3 RIGHTS AND DUTIES UNDER THE ACHPR

The ACHPR is original in many regards. Unlike the instruments discussed thus far, the Chapter covers individual, group and peoples' rights. It also covers civil, political, economic, social and cultural rights. It furthermore includes a list of duties. Although any attempt to compartmentalise rights and duties is not always valid, and the ''compartments'' will inevitably spring leaks and flow over into others, it does make the rights more digestible. So that is what we shall do, on the understanding that there may be overlapping and cross-referencing.

Furthermore, the ACHPR, more than any of the other instruments, requires a careful reading. Various terms are used, and each must be considered within its particular context. One thus finds that the rights are introduced as ''individual'', but also as ''citizens' rights'', peoples' rights, but also ''family rights''. Make sure that in completing the table below you note to whom the rights apply or are addressed, and remember that they can jump around within a single article (see articles 12 and 13).

Before we look at the various categories of rights, however, you must note the obligations which states undertake when becoming party to the ACHPR. These obligations you will find principally in articles 1 and 2, but also in articles 25 and 26.

ACTIVITY 3

1 Which two obligations do states accept in article 1 of the ACHPR?

....

....

....

2 Article 2 of the ACHPR gives the individual a general right in terms of which all other individual or group rights must be applied, while at the same time placing a general obligation on all parties. What is this duty/obligation/right?

....

....

....

3 Article 25 provides

....

....

....

4 Article 26 provides

....

....

....

2.3.1 Individual rights under the ACHPR

ACTIVITY 4

Turn to the ACHPR Part 1 in Study Guide 2 and complete the following table:

ACHPR Article	Right and Special Features	UDHR/ICCPR/ ICESCR
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		

2.3.2 A group right under the ACHPR?

Up to and including article 17 we deal with what the Chapter classifies as individual rights (with a few variations, such as ''citizens'' in articles 13(1) and (2), but again ''individual'' in 13(3)). Articles 19 to 24 deal with what the Chapter terms ''peoples' rights''. What about article 18?

ACTIVITY 5

1 Identify whose rights is protected in article 18(1).

....

....

....

2 What duty does the state undertake in article 18(2)?

....

....

....

3 Identify whose rights are protected in article 18(3).

....

....

....

4 Identify whose rights are protected in article 18(4).

....

....

....

5 Do you see any difference between the recipients of the rights in articles 3 to 17 and those in article 18? Does article 18 deal with individuals as such, or with individuals who fall within a certain class or group? Are these therefore individual or group rights? What is the group in each case? Although the group is made up of individuals, they acquire protected rights not merely because they are individuals, but rather because they are individuals who share certain characteristics.

For example, Fanyana is a 25-year-old male with no disabilities. He is undoubtedly an individual, yet does he have a right in terms of article 18(3) or (4)? No, because, although he is an individual and falls within some group (young males, for example) he does not fall within the group covered by these sub-articles. We feel that the rights in article 18 should be seen as a distinct category. Do you agree?

2.3.3 Peoples' rights under the ACHPR

As we have just seen, the ACHPR identifies individual rights. It also identifies group rights. However, it further identifies ''peoples' rights'' in articles 19 to 24.

ACTIVITY 6

ACHPR Article	Right and Special Features	UDHR/ ICCPR/ ICESCR
19		
20		
21		
22		
23		
24		

Are these rights not perhaps the same as the rights we looked at in article 18? Were we justified in saying that Fanyana was excluded because he did not form part of the group? He is, after all, a person, and article 18 therefore deals with persons' (or peoples') rights!

Think about the following: peoples' rights accrue to all people, but the rights under article 18 do not. The group concept must be seen as distinct from the concept of ''people''. By definition, rights that are ''special'' to a group cannot apply to all people.

ACTIVITY 7

With the help of article 18 to argue your case, explain whether you agree with those authors who distinguish between individual and peoples' rights in the ACHPR, or whether you feel that a further distinction may be drawn. Make sure that you clearly illustrate the differences between the rights as you see them.

PS: We want you to think and argue your viewpoint. There is no right or wrong answer here, and you do not get ''Brownie points'' for agreeing with us!

2.3.4 Duties under the ACHPR

Like the RDM (can you remember it from Topic 4?) and the UDHR (can you remember as far back as Topic 2?), the ACHPR imposes a number of duties on the individual:

ACTIVITY 8

ACHPR Article	Duty and Special Features	UDHR/RDM
27		

28		
29		

We have now worked through the rights and duties imposed or granted by the ACHPR. As with the other instruments, it is time to see what limitations/restrictions are permitted. Here one is immediately struck by the fact that the ACHPR has no general limitation clause, and also no clause ensuring the protection of human rights during states of emergency, which are endemic in Africa, and have often been abused to limit the rights of the individual and entrench the interests of the ruling party.

However, in any study of the ACHPR you will come across the phrase ''clawback clause''. These are clauses within specific articles of the Convention which provide for the limitation of the rights they ensure — what we previously termed ''internal modifiers''. Make sure that you include these in the tables you completed in activities 4, 6 and 8 above.

Space does not allow a detailed study of this aspect. However, should you wish to examine it further, you may consult the article by Dr Leon Wessels (a member of the South African Human Rights Commission) entitled ''Derogation from human rights: a possible dispensation for Africa and southern Africa'' ((2002) 27 *South African Yearbook of International Law* pages 100–120).

Note that you are not expected to study this article for examination purposes, and that it therefore qualifies as neither prescribed nor recommended material. It will, however, give you a broader perspective on the question of limitation/derogation.

ACTIVITY 9

In activity 3 above we looked at the obligations parties to the ACHPR undertake when joining.

Revise what we saw there in the light of this section, and be sure that you can write a short paragraph (10 lines) on the obligations of parties to the ACHPR.

3 ENFORCEMENT UNDER THE ACHPR

Two complementary mechanisms have been established to enforce the ACHPR, namely the African Commission and the African Court on Human and Peoples' Rights. The first was provided for in the ACHPR, while the Court was established by the Protocol.

3.1 THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The African Commission was established within the OAU and continues under the AU (article 30).

3.1.1 Composition and Functioning of the Commission

The Commission consists of eleven members chosen from amongst African

personalities of the highest repute, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights, particular consideration being given to persons with legal experience. (In practice many commissioners exercised political functions in their countries, and their impartiality could not be established.)

Commissioners serve in their personal capacity. They are elected by the Assembly of Heads of state and Government for a six year period, and are eligible for re-election. There cannot be more than one commissioner of the same state.

The Commission elects its chairman and vice-chairman for a two year period. They are eligible for re-election.

The members of the Commission enjoy diplomatic privileges and immunity, and are entitled to emoluments and allowances provided for in the regular budget of the OAU and now the AU.

The Commission submits to each ordinary session of the assembly of heads of state and government a report on its activities.

The Commission draws inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the UN Charter, the AU Constitutive Act, the UDHR, other instruments adopted by the UN and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the UN, and from specialised agencies of which the parties to the ACHPR are members (article 60). This does not mean that the Commission is bound by these instruments. The Commission also takes into consideration other sources of PIL (article 38(1) of the Statute of the ICJ) as subsidiary measures to determine the principles of law (article 61).

3.1.2 Mandate of the Commission

The functions of the Commission are the following:

- to promote human and peoples' rights
- to ensure the protection of human and peoples' rights under conditions laid down by the ACHPR
- to interpret the provisions of the ACHPR at the request of a state party, an institution of the AU or an African organisation recognised by the AU
- to perform any other tasks entrusted to it by the Assembly of heads of State and Government

These functions can be reduced to two, one ''promotional'' and the other ''quasi-judicial'', namely:

- the promotion of human and peoples' rights
- the protection of human and peoples' rights

ACTIVITY 10

Answer the following questions:

1 Under what larger organisation is the Commission intended to function?
2 How many members make up the Commission?
3 Are the members of the Commission government representatives?
4 Which two types of function does the Commission have?

ACTIVITY 11

Compare the functions and composition of the African Commission with those of the American Commission.

3.1.3 Locus standi: Who may approach the Commission?

Two types of complaints, known as ''communications'', can be brought before the African Commission in case of violation of human and peoples' rights protected thereby. As with the other conventions, we distinguish between

- interstate complaints
- individual complaints

3.1.3.1 Interstate Complaints

There are two distinct types of complaint procedure. If a state that is party to the ACHPR has reason to believe that another party state has violated the provisions of the ACHPR, it may call upon either articles 47 and 48 or article 49:

a *Articles 47 & 48: State communication to another state with copy to the Commission and to the Chairman of the AU Commission (initially OAU Secretary General)*

Within three months of the receipt of the communication the other state must provide the enquiring state with a written explanation or statement elucidating the matter, including information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

If the issue is not settled to the satisfaction of the two states within three months from the date on which the original communication was received, either state is entitled to submit the matter to the Commission through its chairman, with notification to the other states involved.

b *Article 49: State communication direct to the Commission*

If a state party considers that another state party has violated the provisions of the ACHPR, it may also refer the matter directly to the Commission through its chairman, the chairman of the AU Commission and the state concerned.

The Commission can only deal with a matter after exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged (article 50).

The Commission will try all appropriate means to reach an amicable solution, and will prepare a report stating the facts, its findings and recommendations. This report will be sent to the states concerned and communicated to the Assembly of Heads of State and Government.

3.1.3.2 Individual complaints

These are complaints emanating from other sources than states. These ''other communications'' may be considered by the Commission if a majority of its members so decide.

Article 56 states the conditions under which these communications relating to human and peoples' rights may be considered.

Prior to any substantive consideration, the state concerned will be informed by the Chairman of the Commission.

When it appears that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission draws the attention of the Assembly of Heads of State and Government to these special cases. The Commission may also submit to the chairman of the Assembly of Heads of State and Government a case of emergency duly noticed by it. The Assembly may then request the Commission to undertake an in-depth study of these cases, and make a factual report, accompanied by its findings and recommendations.

All measures taken by the Commission remain confidential and can only be published upon a decision of the Assembly of Heads of State and Government.

ACTIVITY 12

Explain whether the rule of exhaustion of local remedies provided for interstate complaints in article 50 also applies to other complaints, and whether it is absolute.

ACTIVITY 13

1 From a literal reading of article 55, who may submit communications?
2 How has the Commission interpreted this provision, in other words, whose complaints will it consider?
3. What is a ''special case''? See article 58.
4 What is the first step the Commission takes once it has determined that it is faced with a ''special case''?
5 What is the role of the Assembly of Heads of State in the process?
6 Are there any exceptions to this general rule?
7 Study article 56 and relate it to your answers above. How has the Commission developed the protection of human rights through its practice?

Make sure that you are able to explain the work of the Commission.

3.1.4 Decisions of the Commission, and Enforcement

The Commission is subject to the authority of the Assembly of Heads of State and Government. The decisions that the Commission reach are mere recommendations. The Assembly of Heads of State and Government is the only authority that can authorise these recommendations.

All this contributed to making the African system the weakest of all three regional human rights systems. Calls were made to make it more effective. The obvious choice was a court of human rights for the African continent, as for the other systems we have studied. These calls culminated in 1998 in the adoption of the Protocol to the ACHPR establishing of an African Court on Human and Peoples' Rights.

3.2 THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Much of the developments under this section are based on the Protocol to the

ACHPR establishing an African Court on Human and Peoples' Rights and on Mangu's article on the African human rights system referred to earlier.

3.2.1 Origin of the Court

The main criticism levelled at the African human rights system, as compared to those of Europe and the Americas, was that it lacked a judicial enforcement mechanism and therefore failed to protect the rights enshrined in the ACHPR and other African human rights instruments. Although they had no mandate, some African international lawyers nevertheless strove to justify the position of African leaders who rejected the idea of an African human rights court empowered to make judgments that could be final and binding on OAU member states. We were told that a court did not suit Africans (who) tend to focus on reconciliation and consensus as a means of settling disputes, rather than upon contentious procedures. According to Umozurike, the drafters of the Charter, in fact African leaders who commissioned the work, found formal adversarial procedures common to some Western legal systems inappropriate. It was also argued that African customs and traditions emphasised conciliation rather than judicial settlement of disputes.

Mubangizi and O'Shea point out that if the above views are well founded, then Africans have now been forced to shift their focus. It is true that Africans tend to focus on reconciliation and consensus. However, Western legal systems do not have the monopoly on contentious or adversarial procedures as a means of settling disputes. Nor is reconciliation and consensus a distinguishing African feature. They are known to other peoples, including the Americans and Europeans, whose human rights regional systems provide for courts to deal with human rights violations. Although most but not all African leaders opposed the establishment of an African court on human rights at the regional level, they considered the judiciary an essential component of any domestic legal system. Arguably their opposition to the idea of a court could not be justified on cultural grounds. They were aware that their governments were the first to infringe the rights of their peoples, and could not take the risk of being sentenced publicly by an international human rights court they had themselves established. The thesis that an African court on human and peoples' rights was rejected from the outset, is all the more questionable since the idea of such a court was mooted as early as 1961 during the conference on the rule of law held in Lagos, Nigeria, from 3 to 7 January 1961. This conference was sponsored by the International Association of Jurists and attended by prominent jurists, political leaders, academics and judges from across the continent.

The idea of an African human rights court was revived in the late 1970s by leaders such as the late Senegalese President, Léopold Sédar Senghor, who were among the very few to commit themselves to the ideals of democracy and human rights and could count on the services of eminent jurists such as Keba M'baye, former judge at the International Court of Justice and principal drafter of the ACHPR.

The OAU AHSG met during its 16th ordinary session in Monrovia, Liberia, from 17 to 20 July 1979, and decided on the preparation of a preliminary draft on an African Charter on Human and Peoples' Rights providing, *inter alia*, for the establishment of bodies to promote and protect human and peoples' rights.

OAU experts were thereafter brought together by Secretary-General Eden Kodjo in Dakar, Senegal, from 28 November to 28 December 1979, and adopted a preliminary draft which was amended by the Ministers of Justice of the OAU member states in Banjul, Gambia, from 9 to 15 June 1980 and from 7 to 19 January 1981. The ACHPR was finally adopted when the 18th AHSG met in Nairobi, Kenya, from 15 to 21 June

1981, and came into operation on 21 October 1986. However, no provision was made for a human rights court.

The fears and interests of human rights violators had prevailed over the suffering of the victims whose struggle continued unabated. With the Cold War over, African peoples could expect increased support from Western powers, self-proclaimed champions of human rights and democracy to whom many authoritarian African leaders owed their crowns. They also maintained constant pressure on their leaders and oppressors who were left no choice but to obey the dictates of the changing times: reform the (political and judicial) system and democratise or perish.

Taking advantage of the ACHPR that provides for the adoption of additional protocols to better protect the human and peoples' rights enshrined therein, the 30th Ordinary Session of the OAU AHSG met in 1994 in Tunis, Tunisia, and passed a resolution calling upon the OAU Secretary-General to organise a government experts' meeting to ponder, in conjunction with the African Commission and to consider, in particular, the establishment of an African Court on Human and Peoples' Rights. This came in the wake of the different waves of democratisation on the national level, epitomised by the watershed elections in Benin in 1991 and the advent of democracy in South Africa in 1994. Worldwide, the idea of human rights also gained prominence after the end of the Cold War.

The first meeting of government legal experts took place in September 1995 in Cape Town, South Africa. The Cape Town Protocol became the blueprint for the final protocol. A second meeting was held in Nouakchott, Mauritania, in April 1997, and a third in Addis Ababa, Ethiopia, in December 1997. In December 1997 the draft protocol was considered by a conference of OAU ministers of justice/attorneys-general. In February 1998 the council of ministers endorsed it before its formal adoption by the 34th Summit of Heads of State and Government that took place on 10 July 1998 in Ouagadougou, Burkina Faso. The protocol was to come into operation thirty days after fifteen instruments of ratification or accession had been deposited with the OAU Secretary-General.

Senegal was the first country to ratify the protocol. When the then Senegalese Foreign Affairs Minister, Cheikh Tidiane Gadio, signed the Protocol on the Conservation of Nature and Natural Resources on Friday 16 January 2004 at a ceremony witnessed by the AC president, Alfa Oumar Konare, Senegal became the first African country to sign all the OAU treaties, as an AU communiqué stressed on 17 January 2004. When the protocol came into force on 25 January 2004, thanks to the Comoros becoming the fifteenth country to deposit its instrument of ratification thirty days earlier, five-and-a-half years had elapsed since its adoption in Ouagadougou on 10 July 1998. Almost the same time had been taken for the ACHPR itself (26 June 1981–21 October 1986) to come into operation.

ACTIVITY 14

Explain the main and strongest criticism that was leveled against the African human rights system and the role to be played by the African Court to make it more effective.

3.2.2 Relationship between the Commission and the Court

The African Commission on Human and Peoples' Rights is the only enforcement mechanism provided for in the ACHPR to promote human and peoples' rights and

ensure their protection in Africa. The Protocol to the ACHPR established an African Court alongside the commission. The Court is to complement the protective mandate of the African Commission in the sense that a case can come before the Court only when it has failed to be dealt with satisfactorily by the commission.

The Commission is also the first institution granted access to the Court, and when deciding on the admissibility of a case brought to the Court by non-governmental organisations (NGOs) with observer status before the Commission, and by individuals, the Court may request the opinion of the Commission. The Court may consider these cases or transfer them to the Commission. Arguably, this would take place when a case is not ripe for litigation before the Court.

ACTIVITY 15

Compare the legal nature of both the Commission and the African Court on Human and Peoples' Rights.

3.2.3 Composition and functioning of the Court

The Court shall consist of 11 judges, nationals of member states of the AU, elected by the AU Assembly of Heads of State and Government (AHSG) in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights. State parties to the protocol nominate the judges.

The judges must be representative of the main regions of Africa and of its principal legal traditions. In the election of the judges the AU AHSG should also ensure that there is adequate gender representation.

The judges are elected for a period of six years, and may be re-elected only once. The terms of four judges elected at the first election should expire at the end of two years, and the terms of four more judges at the end of four years. These judges, whose terms are to expire at the end of the initial periods of two and four years, are chosen by lot to be drawn by the AU Secretary-General immediately after the first election has been completed. Judges elected to replace them will only serve for the remainder of their predecessors' terms. All judges except the president perform their functions on a part-time basis. However, the Assembly may change this arrangement, as it deems appropriate. After their election the judges make a solemn declaration to discharge their duties impartially and faithfully. The judges are independent and enjoy the immunity extended to diplomatic agents in accordance with international law.

Their position is incompatible with any activity that might interfere with their independence or impartiality. They may not hear cases submitted by their own states. A judge cannot be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, s/he has been found to be no longer fulfilling the required conditions to be a judge of the Court. Such a decision is final unless the Assembly sets it aside at its next session. The president and one vice-president are elected for two years. They may be re-elected only once. The president performs judicial functions on a full-time basis, and resides at the seat of the Court. This seat is determined and may be changed by the AU AHSG.

The Court functions with a registry consisting of a registrar and other staff from among nationals of AU member states. Expenses of the Court, emoluments and allowances for judges and the budget of its registry are determined and borne by the AU, in accordance with criteria laid down by the AU in consultation with the Court.

ACTIVITY 16

Compare the composition and functioning of the Court to that of the African Commission on Human and Peoples' Rights.

3.2.4 Jurisdiction

The first point to note is that the Court is intended to ''complement'' the ''protective mandate of the African Commission''. To do this, it has two forms of jurisdiction, namely a contentious and an advisory jurisdiction.

The court may be requested to render judgments or give advisory opinions.

In exercising its jurisdiction, the Court applies the provisions of the ACHPR and any other relevant human rights instruments ratified by the States concerned (article 7 of the Protocol).

ACTIVITY 17

Compare article 7 of the Protocol to articles 60–61 of the ACHPR in respect of the sources of law to be applied by the African Court and the African Commission respectively.

3.2.4.1 Contentious jurisdiction and locus standi

The Court may hear all cases and disputes dealing with

- the interpretation and application of the ACHPR
- the interpretation and application of the Protocol itself
- the interpretation and application of any other relevant human rights instrument ratified by the states concerned.

As regards the third category above, note that two ''modifiers'' have been introduced in this draft. The Court is no longer restricted to the interpretation and application of ''any other African human rights convention'' (as was the case under the draft protocol). This, however, does not mean that all human rights instruments can be brought before the Court. There are now two qualifications, namely:

- the human rights instrument must be ''relevant'' (a difficult and essentially subjective concept), AND
- it must have been ratified by the parties concerned

ACTIVITY 18

The draft protocol provided that the Court could hear cases dealing, *inter alia*, with the interpretation and application of ''any other African human rights convention''.

The final protocol, now in operation, provides in this regard for the Court to hear cases dealing, *inter alia*, with the interpretation and application of ''... any other relevant human rights instrument ratified by the states concerned''.

1 Would you say that the jurisdiction of the Court has been extended or restricted by the provision in the final protocol? (Or is it perhaps a little of both?)
2 Compare the mandate of the African Court to that of the Commission, and state whether the Court is restricted to the interpretation of the ACHPR.

Locus standi or access to the African Court is granted to the following parties:

- the Commission
- the state party that has lodged a complaint with the Commission
- the state party against which the complaint has been lodged with the Commission
- the citizen of the state party who is a victim of a human rights violation
- African intergovernmental organisations
- in terms of article 5(3) and with the permission of the Court
  - ''relevant'' NGOs which have observer status before the Commission
  - individuals

The competence of this category (NGOs and individuals) is, however, subject to the provisions of article 34(6) of the Protocol, which requires that at the time of ratification (or any time thereafter) states must make a special declaration accepting the competence of the Court to hear cases under article 5(3). Without such a declaration the Court will not have jurisdiction.

ACTIVITY 19

Explain whether an NGO or an individual from a state party to the Protocol has automatic *locus standi* before the African Court.

ACTIVITY 20

Study the provisions of article 5(3) dealing with the right of individual petition.

Go back to the topic dealing with the European Convention and compare individual *locus standi* before the African and the European Court.

3.2.4.2 Advisory jurisdiction

The Court may give advisory opinions on the following:

- any legal matter relating to the ACHPR
- any legal matter relating to any other relevant human rights instrument

This is, however, subject to the qualification that the opinion must not relate to a matter under consideration by the African Commission. Advisory opinions are given on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the commission.

The following institutions may apply for an advisory opinion before the Court:

- a member state of the OAU (now the AU)
- the OAU (now the AU) itself
- any organ of the OAU (now the AU)
- any African organisation recognised by the OAU (now the AU)

The protocol is more generous than the UN Charter, which only entitles the Security Council, the General Assembly, or with the authorisation of the General Assembly, any international agency, to request such an opinion.

The Court should give reasons for its advisory opinions, and every judge is entitled to deliver a separate or dissenting decision.

3.2.5 Powers of the Court

The Court may first try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter (article 9).

Such settlement is nevertheless difficult in cases where human and peoples' rights such as life and human dignity have been infringed, or in cases of genocide, crimes against humanity, and war crimes. If an amicable settlement is not possible, the Court will make ''appropriate'' orders to remedy the violation.

In terms of article 27 these orders may include an order for the payment of ''fair compensation or reparation''.

In grave and urgent situations, the Court may order provisional measures (measures to be implemented while the Court is deliberating on its final decision) where such action is necessary to prevent irreparable harm to persons — article 27(2). It is up to the Court to determine such cases.

3.2.6 Judgments and enforcement

The Court hears submissions by all parties, and if deemed necessary, holds an inquiry. It may receive written and oral evidence, including expert testimony, and makes its decision on the basis of such evidence. It hands down its judgments within ninety days of having completed its deliberations.

The judgments are final and not subject to appeal. They are binding on states that have accessed to the protocol. They are read in open court, due notice having been given to the parties. Reasons should be given, and separate or dissenting opinions are allowed.

Although its judgments are final and not subject to appeal, the Court may review its decisions in the light of new evidence under conditions set out in its rules of procedure. The Court may also interpret its own decisions. The judgments of the Court are notified to the parties to the case and transmitted to the AU member states, and to the Commission. The council of ministers is also notified of the judgments and monitors the execution of judgments on behalf of the Assembly of Heads of State and Government.

The first judges were sworn in during the July 2006 AU Summit in Banjul, Gambia. On the other hand, a resolution to integrate the African Human Rights Court and the African Court of Justice was adopted by the AU Summit of July 2004. Accordingly we are still, to an extent, working in the dark, until the Court actually starts operating. This notwithstanding, we can work out a case scenario based on what we know so far.

CASE SCENARIO

State Z is a Southern African state which has ratified the Protocol. At the time of its ratification of the Protocol, Z made a declaration in terms of article 34(6) in which it stated that it accepted the ''right of petition under article 5(3)''.

Justice for All Africans (JAA) is an NGO operating in Z. Horrified by the large-scale beating and intimidation of opposition supporters during the run-up to the elections in Z, it wishes to approach the Court for urgent relief, as the election is only 30 days away.

ACTIVITY 21

Answer the following questions, using the ACHPR and the Protocol to substantiate your answers:

1 Does JAA have *locus standi* before the Court?
2 Will the Court have jurisdiction to hear the case?
3 What orders may the Court make in these circumstances?
4 In view of the fact that the election is only 30 days away, what ''special'' measures could the Court decide upon?

4 HUMAN AND PEOPLES' RIGHTS UNDER THE AU, NEPAD AND THE APRM

On 9 July 2002 the OAU was reconstituted as the AU. The Constitutive Act of the AU places far greater emphasis on the protection of human rights than did the Charter of the OAU which, as a product of its time, was largely concerned with the abolition of colonialism and foreign domination on the African continent.

4.1 CREATION OF THE AU

On 9 September 1999 the 4th Extraordinary Session of the Assembly of Heads of State and Government (AHSG) of the OAU met in Syrte, Libya, to reflect on the future of this regional body. The Syrte meeting ended with a declaration calling for the creation of the AU as the ultimate objective of the OAU Charter and the 1991 Abuja Treaty establishing the African Economic Community (AEC).

The AU Constitutive Act was adopted on 11 July 2000 in Lomé, Togo, and came into force on 25 May 2002 after the deposit of instruments of ratification by two-thirds of the OAU member states with the Secretary-General. Its inaugural summit was held in July 2002 in Durban, South Africa. Unlike the OAU Charter, the AU Constitutive Act takes human and peoples' rights more seriously.

4.2 AU OBJECTIVES, PRINCIPLES, ORGANS AND HUMAN RIGHTS

In the preamble to the AU Constitutive Act, the Assembly of Heads of State and Government (AHSG) endorsed the principles and objectives stated in the OAU Charter, and solemnly declared its determination to ensure good governance and the rule of law.

Although it retains the purposes and principles of the OAU in its objectives, the AU Constitutive Act goes one step further, adding new objectives and principles aimed at promoting human rights on the African continent. Amongst its objectives are the following:

(g) to promote democratic principles and institutions, popular participation, and good governance;
(h) to promote respect for human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
(k) to promote co-operation in all fields of human activity to raise the living standards of African peoples;

(n) to work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

To the principles of the OAU, the AU Constitutive Act adds that the Union shall function in accordance with the following principles:

(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity;
(l) promotion of gender equality;
(m) respect for democratic principles, human rights, the rule of law and good governance;
(n) promotion of social justice to ensure balanced economic development;
(o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; and
(p) condemnation and rejection of unconstitutional changes of governments.

It is still early to assess the practice of human and peoples' rights in Africa under the AU which is in its first years of existence. However, the debate on human rights in Zimbabwe during the 2004 summit of the AHSG sent a strong message that there would be little tolerance this time around, and African leaders were no longer as enthusiastic about turning a blind eye or a deaf ear to the cries of the victims of human rights violations on the continent. This is a positive development, since African leaders tended to support one another, and human rights were not often taken seriously during OAU summits.

On the other hand the AU Constitutive Act contains a revolutionary principle inconceivable under the OAU and UN regimes. This principle is ''the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity''. Such a principle conflicts with a number of other principles in the OAU and UN Charters, as well as in the AU Constitutive Act itself. These principles, which remain the founding principles of public international law, include the principles of sovereign equality and interdependence among Member States, respect of borders existing on achievement of independence, prohibition on the use of force or threat to use force among Member States, and non-interference by any Member State in the internal affairs of another.

Finally, the principle authorising AU intervention in a member state in case of war crimes, genocide, and crimes against humanity calls for further analysis since it conflicts with the UN Charter, which provides for action only on the basis of a resolution by the Security Council. The enforcement of this principle will test the determination of African leaders to deliver on the commitments voluntarily made in the AU Constitutive Act.

Regretfully, the AU remained relatively quiet when war crimes, genocide and crimes against humanity were reportedly committed in the Democratic Republic of Congo (DRC). However, the regional body recently took a proactive approach by sending an observer mission to the Sudanese province of Darfur where militia allied to the Khartoum government were accused of grave human rights violations, including genocide. Arguably, the AU intervention in case of gross human rights violations will depend on a decision of the AU, the attitude of the UN Security Council, the political will of many African leaders within the AU, the existence of a well-trained and well-equipped African army, the willingness of AU member states to contribute troops, and adequate financial and material resources at the disposal of the AU to perform its mission.

Some AU organs are set to contribute further to the promotion of and respect for human and peoples' rights in Africa. Hopefully the AHSG as the supreme organ of the Union, and organs such as the Peace and Security Council (PSC), which was established by an additional Protocol to the Constitutive Act, the Executive Council (EC), the African Court of Justice (ACJ), and the African Commission (AC) will play major roles. However, these organs are subordinate to the AHSG, whose members are also held responsible for massive human rights violations in Africa. Accordingly much more will be expected from organs such as the Pan-African Parliament (PAP) and the Economic, Social and Cultural Council (ESCC), which are more independent and representative of the masses of African peoples. Human and peoples' rights are especially important to these two organs.

The PAP consists of the representatives of the parliaments of the AU member states, and is established to ensure the full participation of African peoples. The ESCC is composed of different social and professional groups from AU member states. Hopefully these two organs will work to ensure that relevant legislation that promotes and protects human and peoples' rights is enacted. They should also contribute to the development of constitutionalism, democracy and the rule of law throughout the continent, through monitoring the implementation of the relevant national and international human rights legislation both at the African regional level and the domestic level of all AU member states. Their current status as advisory organs appears inadequate. African peoples should fight to ''domesticate'' the AU to prevent it from remaining an instrument of the AHSG that established it.

In this process one expects that the PAP and the ESCC will become decision-making organs that would push for an amendment of the AU Constitutive Act which gives more prominence to human and peoples' rights. Such amendment may clearly establish the African Court and Commission for Human and Peoples' Rights as AU statutory organs, and highlight human and peoples' rights as one of the areas of common interest to the member states in which the EC would take decisions, and for which the AC should also be responsible as a specialised technical committee. Finally, since the ACJ is still to be established, the envisaged Protocol to the AU Constitutive Act should be inspired in such a way that the court also plays a role in the promotion and respect for human and peoples' rights on the African continent.

ACTIVITY 22

Discuss the protection and promotion of human rights in the AU Constitutive Act, and explain why you think this AU takes human rights more seriously than the OAU.

4.3 NEPAD, APRM AND HUMAN RIGHTS

During its 37th session held in July 2001 in Lusaka, Zambia, the OAU AHSG adopted the Strategic Policy Framework and a new vision for the revival and development of Africa. The Lusaka summit established the NEPAD Heads of State and Government Implementation Committee (HSGIC) chaired by Nigeria's President Obasanjo.

The AU inaugural summit held in July 2002 in Durban, South Africa, adopted a Declaration on the Implementation of NEPAD, formerly NAI (New African Initiative), endorsing the NEPAD Progress Report and Initial Action Plan, and encouraging AU member states to adopt the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG), and to accede to the APRM. The APRM,

which is pivotal to NEPAD and constitutes the most essential test of its credibility, was officially launched during the 9th summit of the HSGIC held in Kigali, Rwanda, from Friday 13 to Saturday 14 February 2004.

NEPAD is an African initiative designed to eradicate poverty and to place African countries, individually and collectively, on the path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic on equal footing. Its twin objectives are the eradication of poverty and the fostering of socio-economic development, in particular, through democracy and good governance. African leaders thereby endorsed Nzongola-Ntalaja's opinion that political freedom and economic prosperity go hand in hand, or Ghali's views that sustainable development is unimaginable without democracy, and there cannot be sustainable development without promotion of democracy, and therefore respect for human rights.

NEPAD is one of the AU structures based on the DDPECG as its founding instrument. In order to achieve NEPAD's objectives, which all revolved around the protection and promotion of human and peoples' rights in Africa, Africa heads of state and government agreed to establish an African peer review mechanism (APRM). The APRM spells out the institutions and processes that could guide future peer reviews based on mutually agreed codes and standards of democracy and political, economic and corporate governance. The APRM, which is NEPAD's linchpin, takes human and peoples' rights one step forward. Ghana offered itself as the first country to be subjected to the APRM. So far it has been followed by Rwanda, Kenya, Algeria and South Africa.

Given the emphasis on constitutionalism, democracy, good governance, rule of law, and human and peoples' rights entrenched in the AU Constitutive Act, the NEPAD and the APRM instruments, and the mandate vested in the African Court, one can reasonably say that contrary to predictions by Afro-pessimists and other prophets of doom, there is a future for human and peoples' rights on the African continent. Coupled with the dictates of NEPAD and the APRM, the establishment of institutions such as the Pan-African Parliament, Peace and Security Council, Economic, Social and Cultural Council, and African Court of Justice, suggests that the human rights landscape in Africa is set to change further. Never again will human and peoples' rights be considered a luxury in Africa. Because human rights are expressly on the agenda of the AU, and the Union actively promotes cooperation within the African continent and a common approach to pressing problems, it may be assumed that the development of human rights on the continent will be actively promoted by the Union.

ACTIVITY 23

Discuss the status, the future and the challenges to the protection of human rights under the AU, NEPAD and the APRM.

We shall not study the AU, NEPAD and the APRM in any further detail: it is a study on its own, encompassing far more than international human rights.

If you would like to read a sound evaluation of the AU and its relation to the OAU and the African human rights system under the AU, New NEPAD and the African Court, you may read (it is neither prescribed nor recommended literature in the formal sense) the article by Professor André Mbata Mangu entitled ''What future for human and peoples' rights under the African Union, New Partnership for Africa's Development,

African Peer-Review Mechanism, and the African Court'' (2004 (29) *South African Yearbook of International Law* pp 136–163).

5 FEEDBACK ON SOME OF THE ACTIVITIES

ACTIVITY 1

See Study Guide 2 (the ACHPR), and do the activity.

ACTIVITY 2

Self-evaluation.

ACTIVITY 3

Under article 1 of the Charter, state parties (1) recognise the rights contained in the Charter, and (2) undertake to adopt legislative or other measures to give effect to the rights.

Article 2 of the Charter grants a right to individuals to the enjoyment of the rights in the Charter without any distinction of any kind such as race, ethnic group, et cetera. So it is a right to equal enjoyment of the rights contained in the Charter. The obligation imposed on the state is the obligation not to discriminate against individuals when giving effect to the rights in the Charter. There are two important points here for you to note. First, the right enjoyed by an individual implies a duty on the state party. Secondly, this particular right is not a blanket nondiscrimination right. It is linked specifically to the enjoyment of the rights in the Charter.

ACTIVITY 4

See Study Guide 2 (the UDHR, the ICCPR, the ICESCR and the ACHPR) and complete the table. The following is just to assist you:

ACHPR	RIGHT AND SPECIAL FEATURES
3	Equal protection of the law.
4	Respect for life and physical integrity. Has an internal limitation/ qualifier.
5	Human dignity.
6	Liberty and security of persons. Subject to a ''clawback clause''.
7	Right to have cause heard (the ''right-to-a-fair-trial'' clause)
8	Freedom of conscience and religion. Also subject to a clawback clause.
9	Free expression and right to receive information.
10	Freedom of association. Subject to duties contained in article 29.
11	Freedom of assembly. Subject to a clawback clause.

ACHPR	RIGHT AND SPECIAL FEATURES
12	Freedom of movement and residence. Also subject to a clawback clause
13	Political rights, such as the right to vote. Limited to citizens.
14	Right to property. Limited by public need or community interest.
15	Right to work.
16	Right to health. Includes both physical and mental health.
17	Right to education.

ACTIVITY 5

Beneficiaries of the right protected in article 18(1): the family as a group. Duty that the state undertakes in article 18(2): to assist the family. Beneficiaries of rights protected in article 18(3): women and children. Beneficiaries of rights protected in article 18(4): the aged and the disabled.

ACTIVITY 6

See Study Guide 2 (the ACHPR, the UDHR, the ICCPR and the ICESCR).

The following is to assist you:

ACHPR	RIGHTS AND SPECIAL FEATURES
19	Right to equality (peoples' right).
20	Right to existence and self-determination (peoples' right).
21	Right to freely dispose of wealth and natural resources (peoples' right).
22	Right to economic, social cultural development (peoples' right).
23	Right to national and international peace and security (peoples' right).
24	Right to the environment (peoples' or group's right).

ACTIVITY 7

This is not the answer! This is just something to guide you in thinking about your argument. Clearly there is a distinction between individual rights and peoples' rights. Individual rights are protected in articles 2 to 17. Article 19 protects peoples' rights. However, article 18 seems to protect groups that can be said to be neither individuals nor peoples. Accordingly, a further distinction may be drawn between individual, peoples' and groups' rights. Do not assume that we know the differences between groups, peoples and individuals.

ACTIVITY 8

See Study Guide 2 (the ACHPR, the UDHR and the RDM):

ACHPR	DUTY AND SPECIAL FEATURES
27	Duties towards family and society.
28	Duty to respect and consider fellow human beings without discrimination.
29	General duties to society.

ACTIVITY 9

Self-evaluation.

ACTIVITY 10

1 Under what larger organisation is the Commission intended to function?

Initially under the OAU. It will now operate under the AU.

2 How many members does the Commission have? 11.
3 Are the members of the Commission government representatives? No, the members are to serve in their personal capacities.
4 Which two types of function does the Commission have?

(a) the promotion of human rights
(b) the protection of human rights

ACTIVITY 11

Self-evaluation.

ACTIVITY 12

The answer is yes. The rule of exhaustion of local remedies applies. However, it is not absolute. When local remedies do not exist, are ineffective or may have been unnecessarily prolonged, the African Commission may consider a communication.

ACTIVITY 13

- From a literal reading of article 55, who may submit communications? From a literal reading of article 55, complaints can be submitted by a wide range of parties, including states that are not party to the Charter.
- How has the Commission interpreted this provision — in other words, whose complaints will it consider?

Complaints are permitted from state parties, and not from states that are not parties to the Charter.

- What is a ''special case''? See article 58: a case in which there is a series of serious or massive violations of human and peoples' rights.
- What is the first step the Commission takes once it has determined that it is faced with a ''special case''?

  It must bring the case to the attention of the Assembly of Heads of State and Government.

- What is the role of the Assembly of Heads of State in the process? It may request the Commission to investigate.
- Are there any exceptions to this general rule? If there is an emergency case, the Commission must submit the case to the Chairperson of the Assembly of Heads of State and Government
- Study article 56 and relate it to your answers above — how has the Commission developed the protection of human rights through its practice? Article 56 simply sets out the admissibility requirements of communications received by the Commission. In other words, the Commission will not consider any communications that do not comply with article 56.
- Make sure that you are able to explain the work of the Commission, using the examples.

ACTIVITY 14

Self-evaluation. Possible examination question.

ACTIVITY 15

Both the African Commission and the African Court are enforcement mechanisms of the ACHPR. They were established to protect and promote human and peoples' rights. However, the Commission has a much more promotional than protective role. It is less independent and its decisions are not binding. On the other hand the African Court is a judicial organ. It makes judgments that are binding on states and may be enforced against them. It is intended to be a more powerful and effective mechanism.

ACTIVITY 16

Self-evaluation.

ACTIVITY 17

Self-evaluation. Possible examination question. Note difference between ''apply'' and ''draw inspiration'' or ''take into consideration''.

ACTIVITY 18

Self-evaluation. Possible examination question.

ACTIVITY 19

An NGO or an individual does not have automatic *locus standi* before the African Court. The state affected by the complaint should have made the declaration prescribed in article 34(6) of the Protocol, accepting the competence of the Court to receive petitions under article (3), that is those emanating from NGOs with observer status before the Commission and from individuals.

ACTIVITY 20

Compare *locus standi* of individuals under both human rights instruments. Under the Protocol to the ACHPR the right of individual petition is subjected to a declaration by a state party that it recognises the competence of the African Court to deal with cases submitted by individuals and nongovernmental organisations. On the other hand individuals have direct access to the European Court.

ACTIVITY 21

Self-evaluation. A possible question for the examination.

ACTIVITY 22

Self-evaluation. Possible examination question.

ACTIVITY 23

Self-evaluation. Possible examination question.

TOPIC 6

INTERNATIONAL HUMAN RIGHTS AND MUNICIPAL LAW

1 INTRODUCTION

2 INTERNATIONAL LAW AND THE 1996 CONSTITUTION

2.1 International law as substantive law

2.1.1 Treaties
2.1.2 Customary international law

2.2 International Law as tool of interpretation

2.2.1 Section 233: interpreting legislation
2.2.2 Section 39: interpreting the Bill of Rights

2.3 Three vital questions

2.3.1 What is ''international law'' in section 39?
2.3.2 Where do you find IHRL?

2.3.2.1 International instruments (treaties)
2.3.2.2 How do municipal courts interpret human rights clauses?
2.3.2.3 Customary IHRL
2.3.2.4 Soft law

3 SOLVING AN IHRL PROBLEM

4 FEEDBACK ON SOME OF THE ACTIVITIES

Study outcomes for Topic VI

After studying this topic you will be able to:

- explain the difference between IHRL and the municipal law of South Africa (or any other country)
- discuss and evaluate the general pattern of international law within the Constitution
- analyse the provisions of the Constitution dealing with international law
- analyse, explain and apply section 39 of the Constitution
- assess the interaction between the Constitution and IHRL
- find the international law you are required to apply under the Constitution
- apply IHRL in your legal practice to solve a practical problem
- explain how the courts apply (mis-apply) IHRL

1 INTRODUCTION

We began this course by mapping the development of IHRL within general international law. Having done this, we examined the four major international law systems, namely

- the UN system (universal regulation) Topic 2
- the European system (regional regulation) Topic 3
- the American system (regional regulation) Topic 4
- the African system (again regional regulation) Topic 5

in considerable detail. So, you are now able to identify the various systems and the instruments which created them. You can also explain what this means in practical terms. You have identified the various rights operating within the systems, how they differ from system to system, and when, why and how they may legitimately be limited within each system. You are also very familiar with the enforcement mechanisms set up by the various universal and regional documents to enforce these rights within the international and regional spheres.

Where does that leave you as a South African lawyer practising/advising/judging on IHRL? What we need to do now is to concretise IHRL within your context: in other words, we have to find out what the role of IHRL is in the South African context, and more specifically, the law and jurisprudence of the post-1994 era.

As you know from your study of general international law (which you have either completed or are doing in tandem with this course), international law, and therefore IHRL as a subset of general international law, operates between states. The parties to all the instruments we have studied are states, and not individuals. The rights and obligations arising are therefore, in the main, obligations between states (unless states have agreed to extend them to individuals), and operate in the international sphere.

You, on the other hand, are not a state and, generally speaking, nor is your client who has been denied his or her freedom of movement! How then do we bring you and your client, who are operating within South African law, into contact with the rights enshrined in the IHRL instruments?

PIL offers no general rule in this regard, leaving it up to the municipal law of individual states to determine how, and to what extent, international law applies within their territories. (What principle of international law would you say this is based on? Yes, our old ''friend'', sovereignty!) It is the right of each state to determine the laws governing its country.

In South Africa the role of international law in the Republic is determined by the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). It is therefore to the Constitution that we must turn to bring you, your client, and the courts together.

2 INTERNATIONAL LAW AND THE 1996 CONSTITUTION

Much of the course on general international law (LCP401H) is devoted to the role of international law in the Constitution. You are expected to know the contents of that (or an equivalent) course, and it will not be repeated here in detail.

Some revision is, however, necessary for us to place IHRL within the general structure of this course. Broadly speaking, international law fulfils two distinct roles in the Constitution.

2.1 INTERNATIONAL LAW AS SUBSTANTIVE LAW

First, we find the direct application of international law rules by the courts. This is governed by two sections in the Constitution, namely treaties and customary international law.

2.1.1 Treaties

Section 231 deals with the conclusion and municipal application of treaties. Obviously, as most of IHRL is treaty-based, it is important to know how a treaty becomes available to a South African court. This is dealt with in detail in the general course, and we expect you to know these provisions. Briefly stated, a treaty applies in South African law only once it has been incorporated by legislation (s 231(4) of the Constitution). Once it has been incorporated, (ie into the laws of South Africa), it applies with full force of the law as an equal part of South African law, and must be applied by the courts. This is known as the domestic incorporation of international law into the ''local'' or ''domestic'' system of laws. It will therefore appear in the South African statute books.

2.1.2 Customary international law

Section 232 of the Constitution deals with customary international law. This, too, is fully covered in the general course and, again, we expect you to know how custom is formed, and its role in South African law. Again, as a rule of thumb, customary international law is law in South Africa (on an equal footing with the common law, non-conflicting legislation — again you see the tracks of domestic legislation — etc). As such, it is available to, and must be *applied* by, the courts.

2.2 INTERNATIONAL LAW AS TOOL OF INTERPRETATION

The second role fulfilled by international law in the Constitution is the use of its provisions in the interpretation, either of the Constitution itself, or of general South African legislation or the common law. There are also two sections involved here.

2.2.1 Section 233: interpreting legislation

This section provides that a court interpreting any legislation has to prefer an interpretation which is in accordance with international law over any interpretation which is not in accordance with international law.

Section 233 is open to various interpretations and, perhaps for this reason, is one of the most underutilised provisions in the Constitution. Although it passes as an interpretation provision, this is not entirely accurate. If you have two options, A and B, and you are expressly instructed to ''prefer'' B, you are in fact applying (not merely having regard to or considering) B when you do so.

Therefore, when the Constitution provides that the international law interpretation must be ''preferred'', is it not in fact instructing courts to apply international law? Or is this a discretion conferred onto our courts? Bear this provision, together with sections 231 and 232, in mind when we study the most important section of the Constitution as regards IHRL, namely section 39.

2.2.2 Section 39: Interpreting the Bill of Rights

This is the most important provision in the Constitution and in South African law in general in respect of IHRL. Study it in detail and make sure that you can answer both

factual and ''problem''- type questions based on this section. Although as a rule we do not encourage students to ''learn things by heart'', there are times when being exact can be a life-saver, and this is one of them. Please try to memorise this section so that when you write, you may write with a sense of ''authority.''

Section 39 of the 1996 Constitution entitled ''Interpretation of Bill of Rights'' reads as follows:

39(1) When interpreting the Bill of Rights

(a) a court, tribunal or forum ***must*** promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (our emphasis)
(b) ***must*** consider international law; and (our emphasis)
(c) ***may*** consider foreign law. (our emphasis)

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Our first task is to analyse this section. Note the followings points:

- **A court, tribunal or forum**
- must promote the values of a democratic society and
- **must** consider international law, and
- **may** consider foreign law.

Dealing first with the first phrase above, note that the ''command'' to consider PIL is not restricted to the courts. (It is imperative for the Courts to do the things listed. The Court does not have a discretion. It ''must'' do certain things asked of the Constitution.) It will therefore apply not only to all courts, but also to any tribunal or any forum. This widens the scope for the use of PIL considerably. It now includes work forums under the Labour Relations Act, for example, and commissions of inquiry, et cetera.

The point we are trying to make here is that you must not think that the adjudication of human rights, and therefore the application of international law, is something remote which is restricted to the Constitutional Court. Most of the judicial tribunals in the country and therefore the people appearing before these forums will have to work with these concepts.

Secondly, you must note that this is not a polite request to the courts. As you will remember from the course on the interpretation of statutes, the term ''must''/ ''shall'' has a specific meaning. It means that the provision is peremptory, that is, the courts must consider these principles (see, eg, *Gcwabe* 1979 (4) SA 986 (A)). However, applying the same principle later in the section, you will see that the courts **may** have regard to foreign law. The use of the word ''may'' allows a court of law interpreting a right within the Bill of Rights a measure of discretion when examining foreign law. Unlike the ''consideration'' of international law which is a ''must,'' the ''consideration'' of ''foreign law'' is discretionary. Thus an aggrieved individual has a stronger possibility of taking a court on review or appeal with regard to the consideration of ''international law'' as opposed to ''foreign law.'' Keep in mind that international law is binding on states, whereas foreign law is merely of persuasive value.

It is very important to note that the section does **NOT** provide that the courts must **apply** PIL, but only that they must **have regard** to it. In other words, the court is applying South African law, but it is under an **obligation** to consider whether the South African law it applies is in line with international law on the same point. From the practitioner's point of view, this does not really make that much difference. You will still be expected to present the position under IHRL, so that the presiding officer can ''have regard to'' it.

Note that section 39 provides for the consideration of ''international law'', while its predecessor (s 35 of the interim Constitution) stipulated ''public international law applicable to the protection of the rights entrenched in this Chapter''. Therefore, while under the old section 35 one could argue for the application of IHRL rather than general international law, this is no longer necessarily the case.

ACTIVITY 1

Discuss the place of PIL in general and IHRL in particular in the 1996 Constitution of the Republic of South Africa.

ACTIVITY 2

Explain whether PIL may be used as substantive law or just as a tool in constitutional interpretation.

ACTIVITY 3

Discuss the status of international law in the interpretation of the Bill of Rights with reference to section 35 of the Interim Constitution and section 39 of the 1996 Constitution of the Republic of South Africa.

ACTIVITY 4

South African case law on IHRL is growing daily. Study some of the cases and discuss the statement made by Botha and Olivier in ''Ten Years of International Law in the South African Courts: Reviewing the Past and Assessing the Future'' (2004) (29) *South African Yearbook of International Law* pp 42–77) that ''South African law must now be regarded as among the most progressive and international-law-friendly in the world''.

2.3 THREE VITAL QUESTIONS

To analyse this section, you must be able to answer the following three basic questions:

- What is the ''international law''' intended in this section?
- Where can it be found?
- How do you use it in a practical situation?

We shall now take the above one at a time:

2.3.1 What is "international law" in section 39?

In modern legal systems human rights are generally embodied in a constitution, and as you know, a constitution is a piece of municipal legislation. The logical question arising is the following: Is IHRL therefore not governed by municipal rather than international law? The answer is, as so often: yes and no. The days are long past (as South Africa has discovered to her expense) where human rights and their abuse could be regarded as a purely domestic concern. What began as the constitutional rights of a specific municipal system of law expanded to form constitutional rights shared by a number of countries, and finally became what Henkin (*The age of rights* (1990) 13–14) describes as ''a universal conception and a staple of international Law''. He says that IHRL may be described as ''a separate branch of PIL deriving from the constitutional will of states and aimed at the protection of the individual in the face of sovereign power''.

At this point it is perhaps wise to stress that an individual claiming his or her internationalised rights under the Bill of Rights has not been magically elevated to the status of a PIL subject. His or her claim remains a municipal one, operating on the municipal law level. The application of international human rights within a municipal system is activated and controlled by the rules of that municipal system, which determine to what extent international law may, or may not, be applied. It is the interpretation of that claim by the courts — the fleshing out of the claim — which is international. IHRL ''supplements and monitors'' the rights which accrue to the individual under municipal law.

As was pointed out above, the 1996 Constitution refers to international law in general, as opposed to the interim Constitution, which referred to ''international law applicable to the rights entrenched in this chapter (Chapter 3)''. The change is, however, not fundamental, in our view. When dealing with human rights, it is only logical that one's ''first line of attack'' will be IHRL.

2.3.2 Where do you find IHRL?

This was discussed in Topic 1, and boils down to the following question: What are the sources of IHRL?

The primary sources of IHRL are **treaties**, which have to a greater or lesser extent influenced one another and together make up modern-day IHRL. As with general PIL (article 38(1)(b) of the Statute of the ICJ), our primary source is therefore ''treaty''. (Yes, you are quite right — there is one exception in the form of the UDHR, which, although a major source of IHRL, is not a treaty. We are so pleased that you remembered this!)

These are the materials which you have been studying thus far in Topics 2 to 5 of the course.

To these treaties one must add the other sources, namely

(1) **decisions of municipal courts** interpreting analogous bills of rights within their own countries (article 38(1)(c) of the Statute of the ICJ)
(2) **customary PIL** (article 38(1)(b) of the Statute of the ICJ)
(3) **''soft law''** (article 38(1)(d) of the Statute of the ICJ)

Each of these will now be examined more closely.

2.3.2.1 International instruments (treaties)

The logical first step is to compare our Bill of Rights with the human rights documents above to determine which one it most closely resembles. This will then be the primary document to which you will turn for guidance. However, you will soon discover that the various documents have borrowed heavily from one another, with the result that it is often not possible to say categorically that right A comes from the UDHR while right B comes from the ICCPR. Some rights occur in all human rights documents, while others are found in none of the traditional sources.

The advantage of entering the bill of rights arena some 40 years after the ''show'' began is of course that you have so much more to choose from. Also, your bill of rights is up to date. In fact, it is often way ahead of the approach to human rights in other traditionally more liberal countries.

Although the South African Bill of Rights reflects this diversity and cannot be regarded as a clone of any one document, we feel it is strongly reminiscent of, and most closely analogous to, the ICCPR. The South African Bill of Rights was a political compromise taking into account many jurisdictions of the world and the major international human rights instruments. However, given the leading role which South Africa is set to play in Africa, we may expect an ''Africanisation'' of international law, and particular attention should be paid to the ACHPR.

Naturally, gazing perplexedly at the provisions of the various international documents in which rights are recorded is not really going to get you much further. The important task is to establish the meaning of the various rights in the context of these documents. To do this, two principal sources may be tapped.

These sources, which both serve to assist a municipal court to arrive at a meaning for the specific right which is in step with international sentiment, may be loosely classified as sources **ancillary** to the international human-rights documents, and sources **arising** from the documents.

a *Sources ancillary to the documents (external sources)*

We need not spend too much time on sources ancillary to the documents. Suffice it to say that in interpreting treaties (and by analogy, any international agreement), an approach more liberal than that traditionally followed by South African courts is allowed. (See articles 31 and 32 of the Vienna Treaty Convention.) You should therefore examine the preparatory work leading up to the treaty; the actual negotiations, comments and policy options expressed by various states both before and after the adoption of the Treaty; subsequent agreements explaining the application of the Treaty, et cetera.

b *Sources arising from the documents (internal sources)*

Far more important for practical purposes are the sources created by these international human rights documents themselves which give authoritative interpretations of the various rights entrenched in the agreements. In the preceding topics we discussed the workings of these bodies in detail — in fact, that is what we have been doing up to now!

The decisions that you turn to for an explanation of how the rights are interpreted in international law (which is what you are looking for in terms of section 39) are the decisions of the bodies discussed under the enforcement mechanisms discussed in Topics 2 to 5. These are the bodies created by/in terms of the treaties with the express purpose of interpreting and enforcing the rights created in the documents.

Where better to find the meaning of these rights?

At the risk of boring you, note once again that the ''internal sources'' or ''sources arising from the documents'' are not the documents themselves. They are the decisions/recommendations of the bodies set up in terms of the documents to enforce the rights embodied in the documents. The internal source of the ECHR is therefore the European Court, and not the European Convention! (This may seem obvious, but we promise you that at least half of all students whom we asked this in the past answered ''the ECHR''. No comment!)

ACTIVITY 5

Distinguish between ''external'' and ''internal'' sources of IHRL. Give examples of both.

ACTIVITY 6

Discuss the possible application of customary international law in the South African Bill of Rights. Bear in mind the wording of section 39 of the Constitution.

2.3.2.2 How do municipal courts interpret human rights clauses?

The second, and very important, source of IHRL is the interpretation accorded to the various rights enshrined in the Bill of Rights by the national courts of other countries in whose bills of rights the particular right in question also occurs.

NOTE: the decisions of foreign courts (eg, Canadian, American, German, Nigerian, Senegalese, or whatever) **ARE NOT INTERNATIONAL LAW**.

They are **FOREIGN LAW**. They are an ancillary or secondary source which tells you how a foreign court which applies its own law (as opposed to an international court which applies international law) views the rights established in the international documents and pronounced on by the various international courts and commissions. These decisions are handy AIDS to the interpretation of IHRL, but do not on their own establish IHRL. It is therefore not enough merely to look at foreign case law, and this is also not what section 39 ''orders'' us to do.

We do not have to look far for examples. Our neighbours, Zimbabwe and Namibia, both followed the constitutional-bill-of-rights trail when they gained independence. Both, too, had emerged from repressive regimes which could by no stretch of the imagination have been said to have had flourishing human rights cultures (and at least one would appear to be degenerating into its old ways!) However, in both instances the judiciary have risen to the occasion and delivered a series of judgments which serve as striking examples of what can be done with the correct attitude.

In Zimbabwe the judgments of Gubbay JA in *S v Ncube* 1988 (2) SA 702 (SC) and *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General* 1993 (4) SA 239 (ZSC), and that of Dumbutshena CJ in *S v A Juvenile* 1990 (4) SA 137 (ZSC) serve as examples.

In Namibia the judgment by Hendler J in *Namibian National Students' Organisation v Speaker of the National Assembly for South West Africa* 1990 (1) SA 613 and that of Mahomed AJA in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) deserve consideration.

We now, of course, also have our own Constitutional Court decisions. The Constitutional Court is your first line of attack in establishing the ambit of a right in South African law.

2.3.2.3 Customary IHRL

We have already dealt with the formation, nature and binding force of customary international law in some detail. Customary IHRL must meet these same conditions.

However, because we regard IHRL as a separate branch of general public international law with sources of its own, we distinguish between customary international law in general (which is a very important source), and customary IHRL.

For the present purposes it may merely be noted that there is no notable general international customary human rights law. The seminal decision in *Filartiga v Pena Irala* (1980 ILM 966) made it clear that the development of customary international human rights will take place on a right-by-right basis. The usefulness of customary international law within a bill-of-rights structure is limited. It would appear that in the face of an entrenched bill of rights, the role of customary law is secondary. However, Lillich says: Customary international human rights law has not been rendered redundant. It can be used both to inform and flesh out various provisions in the Bill of Rights. Secondly, it can be invoked as an independent rule of decision in situations where the Bill of Rights offers no or less protection.

In this sense, the role of customary IHRL is similar to the role of PIL in our bill of rights. It fleshes out, or gives content to, the right, with the important difference that treaties (and in particular the ''internal sources'') take precedence over custom.

NOTE: We are not saying that custom as a source of general PIL is unimportant. We are saying that custom is less important than treaty as a source of the separate branch of international law known as IHRL, which is largely convention-based.

For those who do not regard IHRL as distinct from general international law, of course the role of custom is very important. It would then fall under the general discussion of custom. You must decide for yourselves which view you support. However, is it not always safer to have two strings to your bow?

Also, it should be borne in mind that even if one does distinguish between customary IHRL and general customary PIL, the former remains a species or genus of the latter. In other words, customary IHRL is still customary PIL. As you will remember, customary PIL is part of our law (with a status equal to legislation, common law, etc — it is subject only to the Constitution and, in theory, an Act of Parliament). What does this mean in practical terms?

The function of a judge is to apply ''the law''. The function of a South African judge is to apply South African law. If a rule of IHRL (eg the prohibition of torture — see *Filartiga*) has been proved to have developed into a rule of customary PIL, this rule is then part of ''the law'' and must be applied by the judge (and not merely considered). In this sense the role of customary PIL in section 39 is stronger than the role of international law in general, and the role of customary IHRL is considerably strengthened within our municipal law.

2.3.2.4 Soft law

Soft law should be understood to include all those sources which do not traditionally give rise to enforceable law as such. Here one thinks of nonbinding GA resolutions, the opinions of writers and commentators on human rights, directives issued by administrative tribunals, practice in international organisations, and the like.

Soft law should not take precedence where there is ''hard law'' dealing with a particular right, but where soft law constitutes the only, or the most relevant, information on a particular right, its importance will, of course, increase proportionately. The importance of soft law in the South African context emerges clearly from the approach of the Constitutional Court in *Makwanyane* (see below).

3 SOLVING AN IHRL PROBLEM

You have passed IHRL (and a few other less important subjects!) and are now an attorney (or an advocate, as you could find articles!). Johnny was caned at school for not doing his homework and for telling his teacher that as he finds corporal punishment degrading, he may not be caned. His father approaches you, and you have to argue the point in court. How will you set about convincing the court that Johnny's human rights have been violated under international law, as you are required to do under section 39?

Step 1: Determine whether the right involved appears in Chapter 2 of the Constitution

This you do by reading Chapter 2 of the Constitution. You find the ''right'' in section 10, section 12(e) and, because of Johnny's age, section 28(d).

- You have established that there is a right which can be violated. You have established that it is a Chapter 2 right. What does this mean for your approach to the case? It means that section 39 of the Constitution governs the interpretation of the right. This will always be the case whenever you find an alleged violation of a Chapter 2 right. Please bear this in mind.
- What does section 39 provide? It provides that the court must consider IHRL. This means that you must present the court with the position under IHRL.

Step 2: Consult the international documents forming the basis of IHRL, and establish whether they contain this right

- You should now consult the actual texts of the documents and see if there are any specific differences between their provisions and the South African Bill of Rights. For example, our right-to-life provision differs from that in the ICCPR. This must be taken into account in assessing the international case law on the right to life as embodied in the ICCPR.
- What have you done so far? You have established the existence of the right in South African law (Step 1). You have established the existence of a corresponding right in international law, and noted any differences between the two (Step 2). You have also established what sections of the international documents you should consider. Have you established the PIL which you must present to the court? No you have not. Therefore we move on to Step 3.

Step 3: Study recommendations of commissions and decisions of courts established under the international documents (internal sources, above)

This is where you will find the international law which you are required to present to the court. Both commission recommendations and court judgments may be used, but of course the judgments will bear greater weight.

Step 4: Consult foreign case law as a source of IHRL

Here you would follow much the same process as above, except that instead of examining the international documents to find the corresponding provision and checking the two for differences, you would examine the bills of rights of the various states. You need to find a corresponding provision in bills of rights of other states.

The obvious examples in Johnny's case (you had forgotten him, hadn't you?) are the Namibian cases listed above.

Step 5: Customary IHRL is also a source, and must now be considered

Here you will ascertain whether the human right in question (degrading punishment) complies with the international requirements for the formation of custom (*usus* and *opinio iuris*), and can now be said to constitute a customary rule which will bind states, even in the absence of their being party to the international documents. Good luck in proving this!

Step 6: Consider whether there is any ''SOFT LAW'' which could contribute to your understanding of the issue

Here one thinks of commentaries by writers, nonbinding resolutions (eg of the General Assembly or other international bodies).

FINALLY: You then collate these steps and present the ''public international law applicable to the right'' to the court with full confidence. It may not help little Johnny much, but the result will be that no other little Johnnies will be subjected to corporal punishment.

CASE SCENARIO

Mr Campaign is a well-known human rights activist. It is also public knowledge that he is HIV positive. He applies for a post as a Professor at the University of South Africa. Despite being the only qualified candidate who applied, he did not get the post. Mr Campaign claims that his appointment was vetoed because of his HIV status. Mr Campaign visits you, claiming that his constitutional right to equality has been infringed. He tells you of a friend of his in a similar situation who was successful with a claim in the European Court of Human Rights, and another who was similarly successful before the Canadian Constitutional Court.

ACTIVITY 7

Explain, in the light of the facts of the case scenario above,

- how you would go about establishing the position under IHRL in this specific instance.
- the relative weight which a South African court should attach to the decisions of the European Court and the GCC respectively in terms of the Republic of South African Constitution.

Hints:

- What section of the Constitution is involved?
- What must the court consider or apply?
- What type of court is the European Court?
- From where does the European Court get its powers?

- What type of court is the GCC?
- What is the nature of a decision by the European Court?
- Does this differ from a decision of the GCC?
- What would you do if there were no corresponding right in the international documents or bills of rights of other states?
- Where would you then look for IHRL?
- What if there was no customary rule either?
- Stumped hey! (Go back to Topic 1 and read article 38(1)(c) of the Statute of the ICJ. And what about soft law?)

ACTIVITY 8

Explain, with reference to the South African Constitution and case law, the ways in which IHRL may be used to champion human rights in the adjudication of disputes before a domestic court in South Africa where you completed your law degree.

ACTIVITY 9

Identify the cases where IHRL was used, and assess its application in the domestic legal system of South Africa or your country. (Go to the website of the Constitutional Court of South Africa (http://www.constitutionalcourt.org.za), refer to its case law or to the case law of the highest court in your country.)

4 FEEDBACK ON SOME OF THE ACTIVITIES

ACTIVITY 1

PIL in general and IHRL in particular feature prominently in the 1996 Constitution. Reference should be made *inter alia* to section 39, 231, 232 and 233 of the Constitution.

ACTIVITY 2

PIL is used both as substantive law (see s 231 and 232) and as a tool in the interpretation (s 39) of the 1996 Constitution.

ACTIVITY 3

The status of PIL is much higher in the 1996 than in the Interim (1994) Constitution of the Republic of South Africa. Section 35 of the 1994 Constitution provided that when interpreting the Bill of Rights, any court, tribunal or forum **''may''** consider international law. However, the language is different in the 1996 Constitution, where section 39 provides that any court, tribunal or forum **''must''** consider international law even though this does not mean they should apply it. At least they are bound to have regard to it.

ACTIVITY 4

Be careful. Even though South African law is progressive on paper, not all is as it seems. The most important case regarding section 39 of the South African Constitution is *S v Makwanyane* 1995 (6) BCLR 665 (CC). Make sure you understand the difference between binding and non-binding law, and how it is applied in the South African courts.

ACTIVITY 5

Self-evaluation.

ACTIVITY 6

You should mention section 232 of the 1996 Constitution of the Republic of South Africa. The usefulness of customary international law within a bill-of-rights structure is limited. It would appear that in the face of an entrenched bill of rights, the role of customary law is secondary. As Lillich pointed out, ''[C]ustomary international human rights law ... has not been rendered redundant. In the first place, it can be used both to inform and flesh out various provisions in the Bill of Rights. Secondly, it can be invoked as an independent rule of decision in situations where the Bill of Rights offers no or less protection''.

In this sense the role of customary IHRL is similar to the role of PIL in our bill of rights. It fleshes out, or gives content to, the right, with the important difference that treaties (and ''internal sources'') take precedence over custom.

ACTIVITY 7

See the Bill of Rights in the 1996 Constitution (Chapter 2) and article 38(1) of the Statute of the ICJ.

Hints:

- Section 9: the equality and non-discrimination clause.
- Section 39(1)(3): the court must consider, not necessarily apply, international law.
- The European Court of Human Rights is a foreign court established by the European Court. Its decisions are binding on states parties to the European Convention.
- The Canadian Constitutional Court is a foreign municipal court. Its decisions are binding on all state organs and persons in Canada.
- You may refer to customary international law if there were no corresponding right in the international documents or bills of rights of other states.
- IHRL is mainly to be found in the UDHR, the ICCPR and the ICESCR.
- If there were no customary rule, you should consult the general principles of law recognised by civilised nations, judicial decisions, teachings of the most highly qualified publicists of the various nations, and even ''soft law''.

ACTIVITY 8

This activity covers all the work in Topic 6. IHRL is applied in South African law, namely as tool of interpretation and as part of substantive law. You must know the relevant sections in the Constitution and how they work. You must also be able to discuss the relevant case law.

ACTIVITY 9

Self-evaluation. POSSIBLE EXAM QUESTION.

WE HAVE NOW COME TO THE END OF STUDY GUIDE 1, WHICH IS COMPLEMENTED BY STUDY GUIDE 2.

REMEMBER WHAT WE STATED AT THE BEGINNING. THIS IS AN ADVANCED COURSE FOR WHICH THERE IS NO LONGER A PRESCRIBED TEXTBOOK. YOU ARE EXPECTED TO DO YOUR OWN RESEARCH AND BE ALERT TO ANY NEW DEVELOPMENT IN INTERNATIONAL HUMAN RIGHTS LAW.

We hope that the activities in the study guide have been useful as you prepare for your examination. We wish you success with your studies!